Petition

Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS
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81-1493

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

THE GILLETTE COMPANY,

Petitioner,

v.

STEVEN MINER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

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QUESTION PRESENTED

Do the Due Process Clause of the Fourteenth Amendment and basic principles of federalism prohibit a state court in a class action from exercising jurisdiction over class members (1) who are not residents of the forum state, (2) who have no contacts whatever with the forum state, and (3) who have not affirmatively consented to such jurisdiction, where the purpose of such exercise is to adjudicate class members' claims which arise entirely in other states and in which the forum state has no significant interest?

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

Petitioner The Gillette Company* prays that a writ of certiorari issue to review the opinion and judgment of the Supreme Court of Illinois entered in these proceedings on November 13, 1981.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Illinois is reported at 87 Ill.2d 7, 428 N.E.2d 478, and is set forth commencing at page A1 of the Appendix hereto. The opinion of the Illinois Appellate Court is reported at 89 Ill.App.3d 315, 411 N.E.2d 1092, and is set forth commencing at page A20 of the Appendix hereto. The unpublished order of the Circuit Court of Cook County, Illinois is set forth at page A29 of the Appendix hereto.

* Petitioner's statement pursuant to Supreme Court Rule 28.1 is set forth in the Appendix hereto at page A33.

JURISDICTION

The judgment of the Supreme Court of Illinois was entered on November 13, 1981, and this petition for certiorari was filed within 90 days of that date.* This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . ."

The statutory provisions involved are Sections 57.2 through 57.7 of the Illinois Civil Practice Act (Chapter 110, Pars. 57.2 through 57.7, Illinois Revised Statutes). These statutory provisions are set out at page A31 of the Appendix.

STATEMENT OF THE CASE

This action arises out of a nationwide retail merchandising promotion whereby petitioner The Gillette Company ("Gillette") proposed to give a free "Accent" table cigarette lighter, having a suggested retail price of $7.95, to persons submitting a 50-cent postage and handling charge and proofs of purchase of two "Cricket" disposable pocket cigarette lighters. Gillette filled over 240,000 requests for Accent lighters, a substantially greater number than it had expected based upon its experience with prior promotions. Because its supply was exhausted, Gillette was unable to fill approximately 180,000 additional requests and instead

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* No petition for rehearing was filed below. On December 7, 1981, an *amicus curiae* filed with the court below a petition for modification of certain language in the opinion. The petition, which did not go to the merits of the judgment, was denied on January 12, 1982.

returned the 50-cent charge together with a complimentary Cricket lighter and a letter of explanation.

Plaintiff Steven Miner, an Illinois resident, brought this action in the Circuit Court of Cook County, Illinois, on his own behalf and, under Section 57.2 of the Illinois Civil Practice Act (Ch. 110, Par. 57.2, Ill. Rev. Stat.), on behalf of a nationwide class consisting of all other persons who had requested an Accent lighter pursuant to the promotion but had not received one, against defendant Gillette, a Delaware corporation. The Amended Complaint alleges that Gillette's failure to supply Accent lighters constituted a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act (Ch. 121½, Par. 261 *et seq.*, Ill. Rev. Stat.) and a breach of contract on the part of Gillette.

Gillette moved to dismiss the Amended Complaint insofar as it was brought on behalf of a class and, in the alternative, insofar as it was brought on behalf of a class of persons who are not residents of the State of Illinois. In support of the latter motion Gillette submitted briefs to the Circuit Court relying, *inter alia*, upon "the constitutional rule announced in *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), that a nonresident is not subject to the jurisdiction of a state's courts unless he has certain 'minimum contacts' with the state."

Gillette also submitted undisputed evidence that (1) Gillette's corporate headquarters are located in Massachusetts, and the Accent promotion was planned and executed in Massachusetts, (2) the receipt and processing of consumer requests pursuant to the promotion was handled by Spotts International, St. Paul, Minnesota, and took place in Minnesota; (3) no aspects of the promotion took place in the State of Illinois other than those concerned with seeking responses to the promotion from persons located in Illinois; (4) requests for Accent lighters which were not filled came

from persons with addresses in every one of the 50 states, the District of Columbia, Puerto Rico, and Canada; and (5) only 11,456 of the total of approximately 180,000 unfilled requests came from persons with addresses in Illinois.

The Circuit Court of Cook County on September 17, 1979, entered an order denying Gillette's motion to dismiss the action insofar as it was brought on behalf of residents of Illinois but granting the motion to dismiss insofar as it was brought on behalf of persons who were not residents of Illinois (Appendix, A29).

Plaintiff perfected an interlocutory appeal under Illinois Supreme Court Rule 308 to the Illinois Appellate Court for the First District. Gillette in its brief urged the Appellate Court to affirm the Circuit Court ruling dismissing the action insofar as it was brought on behalf of nonresidents on the ground, *inter alia,* that "the Illinois courts cannot constitutionally entertain a class action on behalf of the nonresidents plaintiff seeks to represent because such persons have no contacts with Illinois." The Appellate Court affirmed the order of the Circuit Court in a decision entered on October 3, 1980 (Appendix, A20).

Plaintiff then sought and obtained leave to appeal to the Illinois Supreme Court. In its brief in the Illinois Supreme Court Gillette again urged affirmance of the dismissal of the nonresident claims on the same grounds as in the Appellate Court. The Illinois Supreme Court, however, with two judges dissenting, reversed the Circuit Court's order dismissing the nonresident claims and remanded the case to the Circuit Court for further proceedings. The Illinois Supreme Court admitted that there was no contention that the relationship of nonresident class members with Illinois met the "minimum contacts" test of *International Shoe* and its progeny (Appendix, A3), but held that the "minimum contacts" test did not apply to nonresident plaintiffs in a

class action case (Appendix, A3-A4). The Illinois Supreme Court further held that the constitutionality of the exercise of jurisdiction over nonresident class members in this action under the Due Process Clause of the Fourteenth Amendment was established by the fact that nonresidents would be afforded adequate representation and adequate notice (Appendix, A5-A7). The court thus concluded that a judgment entered on their claims would be binding and entitled to full faith and credit under the United States Constitution (Appendix, A7).

REASONS FOR GRANTING THE WRIT

1. The Decision Below Presents A Constitutional Question Involving Fundamental Principles of Federalism, Not Heretofore Decided By This Court, Which Has Been the Subject Of Conflicting Decisions In State Courts And Which Has Substantial Practical Consequences For State Court Class Action Litigants

The constitutional issue decided by the Illinois Supreme Court has never been decided by this Court and is of great national importance because it has already been the subject of conflicting state court decisions, because it is likely to arise frequently in other cases,* because it involves basic principles of federalism which can only be resolved by this Court, and because its resolution will have substantial practical consequences in this and numerous other state court class actions.

The question presented of the Due Process limitations on state court class action jurisdiction over nonresidents has already been considered in the reported appellate decisions of six states, including Illinois. The decision below

* State courts are usually the only forums for class actions not involving federal questions, because of the limitations on diversity-based class actions in the federal courts as set forth in *Zahn* v. *International Paper Co.*, 414 U.S. 291 (1973).

purports to follow those of the Kansas and Wisconsin Supreme Courts in *Shutts* v. *Phillips Petroleum Co.*, 222 Kan. 527, 567 P.2d 1292 (1977), *cert. den.*, 434 U.S. 1068 (1978) and *Schlosser* v. *Allis-Chalmers Corp.*, 86 Wis.2d 226, 271 N.W.2d 879 (1978) (Appendix, A3-A4).* It is in conflict, however, with the decision of the Pennsylvania Supreme Court in *Klemow* v. *Time, Inc.*, 466 Pa. 189, 352 A.2d 12, *cert. den.*, 429 U.S. 828 (1976), in which the court (see 466 Pa. at 197, n.15, 352 A.2d at 16, n.15) limited a plaintiff class to residents of Pennsylvania and nonresidents who submit themselves to the jurisdiction of the court, citing, *inter alia*, *Hanson* v. *Denckla*, 357 U.S. 235 (1958) and *Pennoyer* v. *Neff*, 95 U.S. 714 (1877). The decision below is also in conflict with the decision in *Feldman* v. *Bates Mfg. Co.*, 143 N.J. Super. 84, 362 A.2d 1177 (App. Div. 1976), which holds that a state court cannot exercise jurisdiction over claims of nonresident class members who have no "contacts, ties or relations" with the state, citing *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), *Hanson* v. *Denckla*, *supra*, and *Pennoyer* v. *Neff*, *supra*. See also *Anthony* v. *General Motors Corp.*, 33 Cal.App.3d 699, 708, 109 Cal. Rptr. 254, 260 (1973) (issue of jurisdiction over nonresident class members discussed but not decided).

As a result of these conflicting decisions, Illinois, Kansas, and Wisconsin courts may enter class action judgments which appear to be unenforceable in Pennsylvania and New Jersey. Moreover, the differing applications of the same constitutional provision greatly encourage forum-shopping by class action plaintiffs. Only this Court can resolve the conflict and thereby eliminate these undesirable consequences.

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* The dissenting opinion below, however, finds *Shutts* to be inconsistent with the court's decision (Appendix, A15).

The issue presented here is also of major constitutional significance because it involves basic principles of state court power in our federal system which are encompassed within the Due Process Clause "acting as an instrument of interstate federalism." *World-Wide Volkswagen Corp.* v *Woodson*, 444 U.S. 286, 294 (1980). If a state court may adjudicate the rights of large classes of nonresidents who have no contacts with the forum state and who do not affirmatively consent to its jurisdiction, such court may be "undermining the ability and the right of other States to regulate transactions within their borders" and "usurping the authority of other jurisdictions," as pointed out by the dissenting opinion below (Appendix, A16, A18). This is especially so where the laws of the various other states govern the claims of nonresidents, as the court below appears to concede is the case here (Appendix, A8-A9), and where, as here, the forum state has no discernible interest in the nonresident claims or their adjudication. Whether such invasions of state sovereignty are permitted by the Constitution is a substantial question that can only be decided by this Court.

Resolution of the issue presented here will have substantial practical consequences in this and other state court class action litigation. If the class action jurisdiction of state courts is not restrained by requirements of either "minimum contacts" or affirmative consent, the likelihood of conflicting nationwide class actions in different state courts involving the same claims is assured. Only this Court can decide whether these potential conflicts are consistent with the governing constitutional principles of state court jurisdiction.

Moreover, a decision on the question presented by this case is important in order to prevent potential further

litigation arising out of this and other state court class action cases and manifest unfairness to petitioner and other litigants in similar circumstances. A finding by a state court that it has jurisdiction over nonresident class members necessarily implies that a judgment involving their claims will be entitled to full faith and credit in other states, as the court below concluded (Appendix, A7). Until the issue presented by this case is resolved by this Court, however, any judgment in this or other state court cases involving nonresident class members will be subject to collateral attack by class members in states where they reside, on the ground that the initial forum did not apply a permissible jurisdictional test. Petitioner and similarly situated litigants in multistate class actions in other state courts should not have to litigate under such uncertainty. It would also be unfair for petitioner to be subjected to an adjudication which is binding on it but which may be attacked by nonresident parties if it is unfavorable to them. Only a decision by this Court in this case on the question presented can bring finality and fairness to this and other state court class actions involving nonresidents.*

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* The right of petitioner to seek review of the decision below at this time is clear. As to standing, this Court has held that where, as here, acquisition of jurisdiction over a nonresident is required before a state court is empowered to proceed with the action, then

> ". . . any defendant affected by the court's judgment has that 'direct and substantial personal interest in the outcome' that is necessary to challenge whether that jurisdiction was in fact acquired." *Hanson* v. *Denckla*, 357 U.S. 235, 244-245 (1958).

The decision below is final for purposes of review by this Court under 28 U.S.C. § 1257(3), on the reasoning of *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555, 558 (1962). Other state court judgments as to jurisdiction rendered at a similar stage of the proceedings have been reviewed by this Court under 28 U.S.C. § 1257 (3) in *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286 (1980), and *Kulko* v. *California Superior Court*, 436 U.S. 84 (1978).

2. The Decision Below Is Not In Accord With Applicable Decisions Of This Court Because It Ignores This Court's Recent Reaffirmation Of The "Minimum Contacts" Requirement And Of The Limitations On State Judicial Power

This Court has recently reaffirmed the "minimum contacts" test of *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945) and its territorial underpinnings. In *Shaffer* v. *Heitner*, 433 U.S. 186, 212 (1977) the Court stated that

> "We therefore conclude that all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny."

And in *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 291-292, 294 (1980) the Court reaffirmed the principle (originally stated in *Hanson* v. *Denckla*, 357 U.S. 235, 251 (1958)) that constitutional restrictions on state court jurisdiction "are more than a guarantee of immunity from inconvenient or distant litigation" but are also "a consequence of territorial limitations on the power of the respective States," which are "imposed on them by their status as coequal sovereigns in a federal system." The decision below is not in accord with these decisions.

The holding of the court below that the "minimum contacts" test is inapplicable to assertions of state court jurisdiction over *plaintiffs* (Appendix, A3-A4) is directly contrary to the statement of this Court in *Shaffer* that *all* assertions of state-court jurisdiction must be evaluated according to the standards of *International Shoe*. There is, moreover, no reason why the test of jurisdiction over nonresident plaintiff class members here should differ from the test of jurisdiction over defendants. Under Section 57.6 of the Illinois Civil Practice Act (Ch. 110, par. 57.6, Ill.

Rev. Stat.), the court may enter a judgment adverse to class members which is binding upon them. Denial of a plaintiff's claim is no less substantial an exercise of state power than is imposition of liability upon a defendant, and jurisdiction to effect such a denial should not be subject to lesser constitutional restriction than jurisdiction to impose such a liability.

The holding of the court below that adequate representation and notice are alone sufficient to confer jurisdiction over nonresident class members squarely conflicts with this Court's reaffirmation in *World-Wide Volkswagen* of the "territorial limitations" on state power flowing from the status of the states as coequal sovereigns in a federal system. State court jurisdiction based upon adequate representation and notice alone has no territorial foundation whatever and recognizes no limitation on the ability of one state to involve itself in the affairs of another. The Illinois Supreme Court's citation of *Hansberry* v. *Lee*, 311 U.S. 32 (1940), and *Hartford Life Insurance Co.* v. *Ibs*, 237 U.S. 662 (1914) does not support its holding. Both cases involved class actions based upon property interests in the forum state, and thus, unlike the situation here, there were both ample "contacts" between class members and the forum state and a substantial need to permit the forum state to exercise jurisdiction.

There are *no* decisions of this Court which recognize state court jurisdiction over nonresidents under the circumstances of this case. The nonresidents have not engaged in conduct having any relationship with the State of Illinois. There is no discernible interest on the part of Illinois in their claims. Those claims can be heard in other forums which have a significant interest and which will be able to

apply their own law. And jurisdiction over nonresidents is not in any way necessary in order for the Illinois court to render a complete adjudication of claims of Illinois residents. None of the factors which this Court has in the past held to support state court jurisdiction are present here.

Jurisdiction over nonresident class members in this action cannot be based upon their consent. Under Section 57.5(b) of the Illinois Civil Practice Act (Ch. 110, Par. 57.5(b), Ill. Rev. Stat.) a person coming within the court's definition of a class *automatically*, without any manifestation of consent whatever, becomes and remains a class member, subject to a binding adjudication of his rights, unless he properly requests to be excluded. The failure of a nonresident class member to take affirmative action to exclude himself from the class under this statute (i.e., "opt out") cannot support jurisdiction in the absence of "minimum contacts." A state which does not have power to compel a nonresident to submit to its jurisdiction cannot logically have power to compel that nonresident to take affirmative action to avoid its jurisdiction.* A contrary rule, allowing exercise of state court jurisdiction over nonresidents by

* The power of federal courts to bind members of nationwide classes who do not "opt out" of common question class actions brought under Rule 23(b)(3) of the Federal Rules of Civil Procedure provides no authority for recognition of such a power in state courts, because the Constitution does not impose territorial jurisdictional limitations on federal courts of the same nature as those imposed on the states "by their status as coequal sovereigns in a federal system."

default, would invite extensive invasions of state sovereignty flatly inconsistent with the limitations on state power imposed by our federal system as spelled out in this Court's opinion in *World-Wide Volkswagen*.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix

No. 54211

IN THE
SUPREME COURT OF ILLINOIS

STEVEN MINER, Appellant v. THE GILLETTE COMPANY, Appellee

Opinion filed November 13, 1981

MR. JUSTICE MORAN delivered the opinion of the court:

Steven Miner, plaintiff, filed a class action complaint in the circuit court of Cook County on behalf of a nationwide class of consumers against the defendant, Gillette Company, in connection with defendant's promotion of its "cricket" disposable butane lighters. Count I alleged that defendant's conduct amounted to an "unfair and deceptive act or practice" within the meaning of the Consumer Fraud and Deceptive Business Practices Act (Ill. Rev. Stat. 1979, ch. 121½, par. 261 *et seq.*). Count II alleged breach of contract. Defendant moved to dismiss the class action. The motion was denied as to the Illinois class. The trial court dismissed the action brought on behalf of nonresident class members but found the question of law concerning the propriety of maintaining the class action on behalf of nonresident members one "to which there is substantial ground for difference of opinion" and, therefore, certified the issue for appeal pursuant to Supreme Court Rule 308 (73 Ill. 2d R. 308). The appellate court initially denied plaintiff's application for leave to appeal. This court, in the exercise of its supervisory jursidiction, ordered the appellate court to grant plaintiff's application for leave to appeal. Upon review the appellate court affirmed. (89 Ill. App. 3d 315.) After allowing plaintiff's petition for leave to appeal, we allowed the Consumer Coalition to file an *amicus curiae* brief.

The plaintiff argues that neither due process nor the Illinois class action statute precludes an Illinois plaintiff from maintaining a multistate class action in Illinois. Defendant, on cross-appeal, contends that the action cannot proceed under section 57.2 of the Civil Practice Act (Ill.

Rev. Stat. 1979, ch. 110, par. 57.2) on behalf of any class, even if limited to Illinois residents.

The defendant conducted a sales promotion by offering to supply a free Accent Table Lighter (accent lighter) to persons remitting proof of purchase of two "cricket" lighters together with 50 cents for postage and handling. At the time, defendant had approximately 200,000 accent lighters from which it expected to fulfill responses to such offer. However, the response to the offer exceeded defendant's expectations and, although 70,000 additional accent lighters were assembled, defendant was unable to fill approximately 180,000 requests. Consequently, defendant mailed a letter to each of the 180,000 persons stating that the supply of accent lighters had been exhausted and apologizing for the inconvenience. At the same time, defendant returned to each of this group of persons the 50-cent postage-and-handling charge together with a free "cricket" lighter. Plaintiff was one of the 180,000 consumers.

Plaintiff contends that the due process clauses of the United States Constitution and the Constitution of Illinois do not prevent the maintenance of a class action on behalf of nonresident class members. In the present case, both the trial court and the appellate court relied on *Spirek v. State Farm Mutual Automobile Insurance Co.* (1978), 65 Ill. App. 3d 440, in holding that absent "minimum contacts" with this State, Illinois courts are without jurisdiction to render a binding judgment over nonresident plaintiffs in a class action suit in that such a judgment would violate due process. The court in *Spirek*, relying on concepts enunciated in *International Shoe Co. v. Washington* (1945), 326 U.S. 310, 90 L. Ed. 95, 66 S. Ct. 154, stated:

> "The due process clause still 'does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has not contacts, ties, or relations.'" *Spirek v. State Farm Mutual Automobile Insurance*

Co. (1978), 65 Ill. App. 3d 440, 453.

Defendant argues that the trial and appellate courts correctly found that the multistate class action cannot be maintained because of the nonresident class members' lack of "minimum contacts" with this State. It bolsters its position by referring to language in various United States Supreme Court cases. (*International Shoe Co. v. Washington* (1945), 326 U.S. 310, 90 L. Ed. 95, 66 S. Ct. 154; *Hanson v. Denckla* (1958), 357 U.S. 235, 2 L. Ed. 2d 1283, 78 S. Ct. 1228; *Shaffer v. Heitner* (1977), 433 U.S. 186, 53 L. Ed. 2d 683, 97 S. Ct. 2569; *World-Wide Volkswagen Corp. v. Woodson* (1980), 444 U.S. 286, 62 L. Ed. 2d 490, 100 S. Ct. 559.) Plaintiff and *amicus* do not contend that the relationship of nonresident class members with this State provides sufficient contacts to meet the "minimum contacts" test of *International Shoe* and its progeny. Rather, it is asserted that the test itself is inapplicable to plaintiffs in a class action case.

The question of whether the "minimum contacts" test is applicable to nonresident plaintiffs in a class action case was addressed in *Shutts v. Phillips Petroleum Co.* (1977), 222 Kan. 527, 567 P.2d 1292. The court found that *International Shoe* and the line of cases emanating from it dealt specifically with nonresident *defendants*.

> "Whether all *nonresident plaintiffs* in a class action are required to have 'minimum contacts' with the forum is a different matter. Because a class action must necessarily proceed in the absence of almost every class member, we hold the residential makeup of the class membership is not controlling. [Citation.] What is important is that the nonresident plaintiffs *be given notice and an opportunity to be heard and that their rights be justly protected by adequate representation.* These are the essential requirements of due process, and they must be satisfied in any class action by every court, state or federal, regardless of the residences of the absent class members. Therefore, while the essen-

> tial element necessary to establish jurisdiction over nonresident defendants is some 'minimum contacts' between the defendant and the forum state, *the element necessary to the exercise of jurisdiction over nonresident plaintiff class members is procedural due process.*" (Emphasis in original.) (*Shutts v. Phillips Petroleum Co.* (1977), 222 Kan. 527, 542-43, 567 P.2d 1292, 1305.)

(See *Schlosser v. Allis-Chalmers Corp.* (1978), 86 Wis. 2d 226, 241-42, 271 N.W.2d 879, 886-87.) Moreover, the Supreme Court has recognized class actions as an exception to the rule requiring *in personam* jurisdiction over a party before he will be bound by a judgment rendered.

> "To these general rules there is a recognized exception that, to an extent not precisely defined by judicial opinion, the judgment in a 'class' or 'representative' suit, to which some members of the class are parties, may bind members of the class or those represented who were not made parties to it. ***
>
> *** Courts are not infrequently called upon to proceed with causes in which the number of those interested in the litigation is so great as to make difficult or impossible the joinder of all because some are not within the jurisdiction or because their whereabouts is unknown or where if all were made parties to the suit its continued abatement by the death of some would prevent or unduly delay a decree. In such cases where the interests of those not joined are of the same class as the interests of those who are, and where it is considered that the latter fairly represent the former in the prosecution of the litigation of the issues in which all have a common interest, the court will proceed to a decree." *Hansberry v. Lee* (1940), 311 U.S. 32, 41-42, 85 L. Ed. 22, 26-27, 61 S. Ct. 115, 118.

This exception has been recognized and employed by this court in *Frank v. Teachers Insurance & Annuity Association of America* (1978), 71 Ill. 2d 583, 592, and *Newberry Library v. Board of Education* (1944), 387 Ill. 85, 90.

> "This exception is made possible by a requirement that the representative parties fairly and adequately protect the interest of the class. *** But adequate representation is not the sole touchstone of due process. There can be threshold findings of adequate representation with notice nevertheless required as a matter of due process to allow members of the class their constitutional opportunity to be heard." (*Frank v. Teachers Insurance & Annuity Association of America* (1978), 71 Ill. 2d 583, 592-93.)

This exception is justified when one examines the nature of a class action suit. Its very purpose is to allow a representative party to pursue the claims of a large number of persons with like claims. It consequently does not contemplate or necessitate the appearance of absent parties. The class action device is, in fact, predicated on the inability of the court to entertain the actual appearance of all members of the class as well as the impracticality of having each member prosecute his individual claim. The basic premise of the class action procedure is the fairness of having a proper representative act on behalf of the absent parties.

The constitutionality of the present class action on behalf of nonresident members must be determined by asking (1) if plaintiff adequately represents the nonresident parties and (2) if notice can insure the class of its constitutional opportunity to be heard and protect each member's option to choose not to participate.

The test applied to determine adequacy of representation is whether the interests of those who are parties are the same as those who are not joined and whether the litigating parties fairly represent those not joined. (*Newberry Library v. Board of Education* (1944), 387 Ill. 85, 90.) The attorney for the representative party "must be qualified, experienced and generally able to conduct the proposed litigation." (*Steinberg v. Chicago Medical School* (1977), 69 Ill. 2d 320, 339.) Additionally, plaintiff's interest must not appear collusive. *Steinberg v. Chicago Medical School* (1977), 69 Ill.

2d 320, 338-39.

In the present case, the claim of plaintiff is identical to that of each of the other class members. Each performed in the identical manner by mailing the required proof of two purchases of "cricket" lighters and 50 cents postage and handling to defendant as required in the promotional offer. Each class member received the same letter of explanation and apology with a 50-cent refund and a free "cricket" lighter. At this stage of the proceedings, there is no evidence that plaintiff's claim is antithetical to those of other members of the class, nor is there evidence that the suit is a collusive or friendly action. These are matters for the trial court's future determination.

The question of what notice must be given to absent class members to satisfy due process necessarily depends upon the circumstances of the individual action. (*Frank v. Teachers Insurance & Annuity Association of America* (1978), 71 Ill. 2d 583, 593.) We believe that in the present circumstances, where the identity and address of each class member is readily accessible by use of defendant's files, individual notice is required in order to insure that each class member's right to pursue his claim is protected. The notice must also inform each class member of his right to "opt out" of the present action and must specify the procedure to accomplish such.

Under the full faith and credit clause of the United States Constitution, a judgment rendered in a State which had proper jurisdiction over the parties must be recognized and enforced in a sister jurisdiction. Absent plaintiffs in a class action suit are bound by such a judgment despite the fact that they were not personally served and did not appear in the rendering court so long as the due process requirements of proper notice and adequate representation were satisfied. *Larson v. Pacific Mutual Life Insurance Co.* (1940), 373 Ill. 614, 623-25; *Hartford Life Insurance Co. v. Ibs* (1914), 237 U.S. 662, 670-72, 59 L. Ed. 1165, 1168-70, 35

S. Ct. 692, 695-96.

Once the trial court determines that the due process requirements of notice and adequate representation have been met, the judgment rendered on behalf of the class members—resident and nonresident—will be binding on each, and such judgment will be entitled to full faith and credit. U.S. Const., art. IV, § 1.

Defendant alternatively argues that the present multi-state class action cannot be maintained in that it does not meet the statutory requirement of a predominating common question of fact or law. It is defendant's position that although there may be a common question of fact, it is not the predominating issue in this action. Rather, defendant contends, the individual questions of law relating to each of the 50 States is the predominant focus of the action.

Section 57.2 of the Civil Practice Act provides:

> "An action may be maintained as a class action in any court of this State and a party may sue or be sued as a representative party of the class only if the court finds:
>
> (1) The class is so numerous that joinder of all members is impracticable.
>
> (2) There are questions of fact or law common to the class, which common questions predominate over any questions affecting only individual members.
>
> (3) The representative parties will fairly and adequately protect the interest of the class.
>
> (4) The class action is an appropriate method for the fair and efficient adjudication of the controversy."

(Ill. Rev. Stat. 1979, ch. 110, par. 57.2.)

The court has explained the test to be applied under section 57.2(a)(2):

> "So long as there are questions of fact or law common to the class and these predominate over questions affecting only individual members of such class, the statutory requisite is met." (*Steinberg v. Chicago Medical School* (1977), 69 Ill. 2d 320, 338.)

Apparently, the appellate court interpreted this section to require *both* a common question of fact *and* a common question of law. Although the court found the presence of a predominating question of fact, it further sought the existence of a predominating question of law. The court stated:

> "[A] common question of fact predominates over any question affecting only individual members ***. However, it is evident that no common question of law predominates as to nonresidents." (89 Ill. App. 3d 315, 319.)

On this basis, the appellate court found that the requirements of section 57.2(a)(2) were not satisfied.

Contrary to the interpretation of the appellate court, the requirement of section 57.2(a)(2) is couched in the disjunctive—"common questions of fact *or* law." It does not, therefore, require the presence of both a common question of fact and a common question of law. However, the finding of a common question of fact or law cannot alone satisfy the statutory requirement, for such common question must "*predominate*" over the individual questions that may be involved. We have already found, under the due process analysis above, the presence of a common question of fact for all class members. The next question under the statute is whether this common question of fact predominates over the individual questions of law inherent in the application of the laws of the 50 States. Because the trial court, relying on *Spirek*, dismissed the class action on behalf of nonresident members on due process grounds, this question was not fully examined.

The class action statute specifically provides for the maintenance of a class action which may be "divided into sub-classes and each sub-class treated as a class." (Ill. Rev. Stat. 1979, ch. 110, par. 57.3(b).) The feasibility of subdividing a class is properly made by the trial court at a preliminary hearing. (See generally *McCabe v. Burgess* (1979), 75 Ill. 2d 457, 467.) We believe that the issue of

whether the common question of fact or the individual questions of law predominate in the present case is dependent upon plaintiff's ability to establish that the differing laws of the States are subject to grouping in a manageable number of subclasses. If, after the parties have produced specific evidence relating to this question, the trial court finds that such subclasses of laws may be made, then the common question of fact will necessarily predominate and the statutory requirement will be satisfied.

Defendant, on cross-appeal, contends that the appellate court erred in its finding that a class action may be brought on behalf of Illinois residents. Defendant argues that class action is inappropriate in that the individual claims of plaintiffs are "de minimis" and have already been compromised in a reasonable manner. Defendant also asserts that the existence of individual questions of fact predominate over common questions of fact, contrary to section 57.2(a)(2) of the Civil Practice Act.

Defendant relies on *Adams v. Jewel Companies, Inc.* (1976), 63 Ill. 2d 336, for its contention that class action status should be denied where individual claims are small. In *Adams*, a class action seeking the refund of cigarette taxes was brought on behalf of persons who purchased cigarettes from the defendant retailer. Although the court found class action to be improper, it did not, as defendant here contends, base such denial solely on the small dollar amount involved in each claim. Rather, the court justified its denial by referring to the vast number of unidentified individuals in the class, the lack of objective corroboration for each claim and the rule of law providing that taxes voluntarily paid cannot be recovered. 63 Ill. 2d 336, 348-49.

In the present case, individuals with potential claims are readily identifiable by examination of defendant's files. Moreover, the object of the class action procedure is to adjudicate a large number of very small claims in one proceeding. We therefore find no merit to defendant's

contention.

Defendant also argues that its action in refunding the 50-cents postage-and-handling charge and providing each class member with a free "cricket" lighter is proof that the claims have been compromised in a reasonable manner and, thus, defeats the present class action.

The general rule is that, on a motion to dismiss, all well-pleaded facts are accepted as true. (*Steinberg v. Chicago Medical School* (1977), 69 Ill. 2d 320, 329.) The facts are undisputed that defendant did not remit the accent lighter as promised in its promotion. Any question of compromise is one of fact which must await trial for determination.

Relative to the maintenance of an action on behalf of the Illinois class, defendant claims that common questions of fact do not predominate, in that individual proof is necessary to establish each member's claim. Defendant contends that the elements of reliance, satisfaction, waiver, and consideration are different in each case and, thus, defeat the requirement of a common question of fact or law under section 57.2(a)(2).

The present case is predicated upon a series of essentially idential transactions by thousands of purchasers, including Illinois residents, which were founded upon and arose out of identical language in the promotional offer prepared by defendant. Unlike in the class of nonresidents, the Illinois class also has a common question of law, that is, the law of Illinois, so that there is no possibility that different questions of law will predominate. Thus, the requirements of section 57.2(a)(2) that there be a predominating common question of fact *or* law is easily met. Once this basic determination has been made, the fact that there may be individual questions, as proposed by defendant, will not defeat the predominating common question. (*Steinberg v. Chicago Medical School* (1977), 69 Ill. 2d 320, 340-41; *Barliant v. Follett Corp.* (1978), 74 Ill. 2d 226, 234.) Moreover, the individual questions postulated by defendant

are mere hypotheticals. This court in *Harrison Sheet Steel Co. v. Lyons* (1959), 15 Ill. 2d 532, 538, stated:

> "But the hypothetical existence of individual issues is not a sufficient reason to deny the right to bring a class action. Where it appears that the common issue is dominant and pervasive, something more than the assertion of hypothetical variations of a minor character should be required to bar the action."

See K. Forde, *Class Actions in Illinois: Toward a More Attractive Forum for this Essential Remedy*, 26 De Paul L. Rev. 211, 221 (1977).

For the reasons stated, we affirm that portion of the judgment of the appellate court upholding the trial court's denial of the motion to dismiss the class action brought on behalf of residents of Illinois but reverse that part of the judgment upholding the trial court's dismissal of the class action brought on behalf of nonresidents. The judgment of the circuit court is affirmed as to the suit by Illinois residents and reversed as to its dismissal of the action on behalf of nonresidents. The cause is remanded to the circuit court for further proceedings not inconsistent with this opinion.

Appellate court affirmed in part and reversed in part; circuit court affirmed in part and reversed in part; cause remanded.

MR. JUSTICE RYAN, dissenting:

Since the Supreme Court has severely limited the availability of the Federal courts for class action litigation (see *Eisen v. Carlisle & Jacquelin* (1974), 417 U.S. 156, 40 L. Ed. 2d 732, 94 S. Ct. 2140; *Zahn v. International Paper Co.* (1973), 414 U.S. 291, 38 L. Ed. 2d 511, 94 S. Ct. 505; *Snyder v. Harris* (1969), 394 U.S. 332, 22 L. Ed. 2d 319, 89 S. Ct. 1053), those seeking to litigate consumer claims have been urging the use of State courts in which to maintain multistate plaintiffs class suits. (See Note, *Toward a Policy-Based*

Theory of State Court Jurisdiction Over Class Actions, 56 Tex. L. Rev. 1033 (1978); Note, *Multistate Plaintiff Class Actions: Jurisdiction and Certification*, 92 Harv. L. Rev. 718 (1979); Comment, *Civil Procedure: In Personam Jurisdiction Over Nonresident Plaintiffs in Multistate Class Actions*, 17 Washburn L.J. 382 (1978); Ross, *Multistate Consumer Class Actions in Illinois*, 57 Chi.-Kent L. Rev. 397 (1981); Forde, *Class Actions in Illinois: Toward A More Attractive Forum For This Essential Remedy*, 26 De Paul L. Rev. 211 (1977).) In fact, partly in response to the Supreme Court decisions above referred to, the National Conference of Commissioners on Uniform State Laws prepared and proposed a Uniform Class Actions Act or Rule. (See Vestal, *Uniform Class Actions*, 63 A.B.A. J. 837 (1977).) I will refer to this uniform proposal later.

I dissent from the opinion of this court because the assertion of jurisdiction over nonresident class members far exceeds the proposal of the uniform act and far exceeds the holding of any case of which I am aware. The opinion seems to be reaching out to sweep into Illinois all nationwide class litigation which cannot be maintained in the Federal courts because of *Eisen*, *Zahn* and *Snyder*, and which no other State will entertain. As I will point out later, *Shutts v. Phillips Petroleum Co.* (1977), 222 Kan. 527, 567 P.2d 1292, relied on by the majority in this opinion to support its decision, is not authority for its holding and, in fact, clearly indicates that this action could not be maintained in Kansas.

The majority opinion omits some essential matters from its statement of facts. In this case, the defendant company, Gillette, is a Delaware corporation, with its headquarters in Massachusetts. The responses to the ad for the lighters were directed to Spott International, a "fulfillment house" in Minnesota. No aspect of the promotion took place in Illinois other than those aspects seeking responses from persons in this State. The 180,000 requests for the accent lighters which

could not be filled came from persons in every State of the United States, the District of Columbia, Puerto Rico, and Canada. About 12,000 unfilled requests came from people in Illinois.

My colleagues found that the "minimum contact" requirement for a court to entertain jurisdiction over nonresident defendants is not applicable to nonresident plaintiffs in a class action. The opinion then lifted some language from the Kansas case of *Shutts v. Phillips Petroleum Co.* referred to above, and found that the only element necessary to the exercise of jurisdiction over nonresident plaintiffs is procedural due process, which would be satisfied by notice to the nonresident plaintiffs and adequate representation of their interests. I submit that more is required.

It is interesting to note that the proposed uniform act retains the "minimum contact" concept for jurisdiction of members of the class whether the action is brought on behalf of a class of plaintiffs or against a class of defendants. Section 6 of the proposed act provides for jurisdiction over a member of a class if "a basis for jurisdiction exists or would exist in a suit against the person under the law of this State." National Conference of Commissioners on Uniform State Laws, Uniform Class Actions [Act] [Rule] § 6 (1976); Vestal, *Uniform Class Actions*, 63 A.B.A. J. 837, 838 (1977); Scher, *Opening State Courts to Class Actions: The Uniform Class Actions Act*, 32 Bus. Law. 75 (1976).) I realize that the Illinois class action legislation is not patterned after the uniform act. However, the jurisdictional provisions of the uniform act indicate that the "minimum contacts" jurisdictional requirement is not a relic of the past and enjoys substantial present-day support.

Admitting that a departure from the "minimum contacts" requirement is permissible, I, nonetheless, maintain that this State must have a certain nexus with the claims of the absent class members before our courts can extend their jurisdiction beyond the borders of this State. It must be

remembered that, by entertaining class actions, Illinois is not simply conferring benefits on the absent class members. It is also binding the absent class members by the judgment rendered in the courts of this State, and it is depriving these absent class members of the right to litigate their claims in the courts of their own States. The mere extending of procedural due process is not by itself sufficient to justify litigating here the rights of those who have no contact with Illinois. In addition to procedural due process, this State must have an interest in the litigation.

In this respect, the majority opinion has misread *Shutts v. Phillips Petroleum Co.* In that case the defendant had withheld certain royalty payments on natural gas to the owners of royalty interests in a gas-producing area known as the *Hugoton-Anadarko* rate-making area until a final determination of the rates. When the determination was made, the defendant made the payments that had been withheld, but paid no interest. The class action was brought to collect the interest on the withheld payments. *All of the State of Kansas*, as well as parts of the States of Oklahoma and Texas, comprised the *Hugoton-Anadarko* area. Kansas comprised the largest portion of the area. The trial court, in *Shutts*, determined "that this court having jurisdiction of a large physical portion of the Hugoton-Anadarko area is a convenient forum for such action." *Shutts v. Phillips Petroleum Co.* (1977), 222 Kan. 527, 539, 567 P.2d 1292, 1303.

In addition to noting the interest of the State of Kansas in the payment of royalties on natural gas extracted from that area, the *Shutts* court also likened the case to one involving a common fund. Had the defendant placed the withheld payments in a trust fund separate from its operating funds, the court stated that the case would "dovetail nicely into the 'common fund' cases." (*Shutts v. Phillips Petroleum Co.* (1977), 222 Kan. 527, 552, 567 P.2d 1292, 1311.) The court held that the fact the defendant had commingled the funds with its own would not take the case

out of the "common fund" category. The court stated that a class action may be binding on nonresident plaintiffs when a "common fund" is involved *and* where due process requirements are met. (*Shutts v. Phillips Petroleum Co.* (1977), 222 Kan. 527, 552, 567 P.2d 1292, 1311.) Kansas clearly had an interest in the litigation, and the *Shutts* case does not hold that extending due process requirements alone confers jurisdiction on the State courts over nonresident plaintiffs. In *Shutts*, the court also discussed *Feldman v. Bates Manufacturing Co.* (1976), 143 N.J. Super. 84, 94, 362 A.2d 1177, 1182, which held that without "affiliating circumstances" between the forum State and the litigation, the judgment in a plaintiff's class action suit could not bind nonresident class members. In *Shutts*, the court stated that *Feldman* was an excellent example of a factual situation in which a judge should deny certification of a class action where nonresident class members are involved. The facts in *Feldman* are strikingly similar to those in our case. The nonresident plaintiffs had no contacts in New Jersey, and that State had no interest in the litigation.

Illinois clearly has an interest in providing a forum wherein its citizens may seek redress for a wrong. Thus, a class action on behalf of resident members of the class is justified. Also, if the defendant had its corporate headquarters in Illinois, or if the solicitation had directed that money be sent to an entity in this State in response to the ad, Illinois would have had some interest in seeing that any wrong arising out of such a solicitation was rectified. But I fail to see any justification for attempting to litigate a claim in Illinois that someone residing in Puerto Rico, Canada, the District of Columbia, or any of the other 49 States has against a Delaware corporation with its headquarters in Massachusetts, when the money solicited was sent to a Minnesota entity. "[T]he crystallized issue simply is whether it is fair, as a policy matter, to permit the forum to resolve the dispute vis-a-vis the nonresidents." (Note, *Toward A*

Policy-Based Theory of State Court Jurisdiction Over Class Actions, 56 Tex. L. Rev. 1033, 1048 (1978).) Mr. Justice Brennan emphasized the policy-based nature of the inquiry, stating the "cases fairly establish that the State's valid substantive interests are important considerations in assessing whether it constitutionally may claim jurisdiction under a given cause of action." (*Shaffer v. Heitner* (1977), 433 U.S. 186, 222-23, 53 L. Ed. 2d 683, 709, 97 S. Ct. 2569, 2589 (Brennan, J., concurring in part and dissenting in part).) Although a State has an interest in protecting the rights of its citizens, it has no duty to protect, or interest in protecting, the rights of citizens of other States. It has been asserted that jurisdiction in class actions will not be upheld where the nonresident has no contact whatever with the particular State. (Note, *Multistate Plaintiff Class Actions: Jurisdiction and Certification*, 92 Harv. L. Rev. 718, 731 (1979).) Absent a nonresident plaintiff's contact with the forum State, or that State's interest in the litigation, it is doubtful if the judgment in the class action would be binding on nonresident plaintiffs or that it would be given full faith and credit or would be *res judicata* in another action against the same defendant by the absentee plaintiffs. This is particularly true where the forum State, in its eagerness to entertain the class action, undertakes to apply and construe the law of the State of residence of nonresident plaintiffs. Such conduct has the potential for undermining the ability and the right of other States to regulate transactions within their borders. *Multistate Plaintiff Class Actions: Jurisdiction and Certification*, 92 Harv. L. Rev. 718, 731-33 (1979).

We must consider with the above reasoning the correlative question: Why should the court system of this State assume the burden of adjudicating and administering a class action of this complexity when Illinois has no connection with the litigation beyond that of protecting its residents. Class actions of this magnitude are time consuming and difficult to manage. They constitute unusual burdens on an

already burdened court system. (Tornquist, *Road Map to Illinois Class Actions*, 5 Loy. Chi. L.J. 45, 47 (1974); Comment, *Consumer Class Actions With A Multistate Class: A Problem Of Jurisdiction*, 25 Hastings L.J. 1411, 1448 (1974).) Even in *Shutts* the court expressed concern about overburdening the Kansas court system by entertaining class actions in which that State did not have an interest. *Shutts v. Phillips Petroleum Co.* (1977), 222 Kan. 527, 557, 567 P.2d 1292, 1314.

> I also wish to point out that the court in *Shutts* stated: "When liability is to be determined according to varying and inconsistent state laws, the common question of law or fact prerequisite [in our statute] will not be fulfilled." *(Shutts v. Phillips Petroleum Co.* (1977), 222 Kan. 527, 557, 567 P.2d 1292, 1314.)

This language forms the basis for another disagreement I have with the majority opinion. In some States a mass promotional scheme, as is involved in our case, is viewed as an offer. (See *Oliver v. Henley* (Tex. Civ. App. 1929), 21 S.W.2d 576.) Whereas, in other States such an advertisement is viewed only as an invitation to make an offer. (See *People v. Gimbel Bros., Inc.* (1952), 202 Misc. 229, 115 N.Y.S.2d 857.) Under the holding of *Shutts*, in the language quoted above this difference would destroy the commonality necessary to the maintenance of a class action under the contract theory under count II of the complaint in our case, whether or not the courts of this State can take judicial notice of and apply the law of other States. (See Ross, *Multistate Consumer Class Actions In Illinois*, 57 Chi.-Kent L. Rev. 397, 418-22 (1981).) The holding of *Shutts*, the case relied on in the majority opinion, makes a class action on behalf of the nonresident plaintiffs inappropriate in this case.

Count I of the complaint is based on the Illinois Consumer Fraud and Deceptive Business Practices Act (Ill. Rev. Stat. 1979, ch. 121½, par. 261 *et seq.*). I just cannot

understand how, under the facts of this case, a resident of Puerto Rico, Canada, the District of Columbia, or any of the other 49 States can possibly have a right to recover under the Illinois statute. The majority opinion speaks of grouping the laws of the various States into a "manageable number of subclasses." (87 Ill. 2d at 18.) It is not clear whether or not the majority, in making this statement, is referring to consumer fraud laws of other States. However, the plaintiff argues in its brief for the application of the consumer fraud laws of the other jurisdictions. Count I of the complaint, however, appears to be based on the Illinois statute and not those of other States. Even if it were proper, under the pleadings of this case, to attempt to apply the consumer fraud statutes of other jurisdictions, it must be acknowledged that these statutes differ substantially and the plaintiffs' rights under such statutes will not be the same. For example, some consumer fraud statutes do not permit a private cause of action or permit one only under certain circumstances. (See *Hoover v. May Department Stores Co.* (1979), 77 Ill. 2d 93.) Under the holding of *Shutts*, this would destroy the common interest necessary for the maintenance of a class action. It appears to me that, in a case where Illinois has no interest, we are reaching out and dragging into this State nonresident litigation from 49 other States, Puerto Rico, the District of Columbia, and Canada, and are usurping the authority of the courts of those other jurisdictions to provide a forum for the protection of the rights of their citizens.

I not only view the majority opinion as usurping the authority of other jurisdictions, but I also see it as imposing a needless burden upon our judicial system accompanied by the imposition of needless expenses upon the taxpayers of this State. The opinion speaks of grouping the classes into a "manageable number of subclasses." (87 Ill. 2d at 18.) Of course, any litigation is manageable if sufficient resources are devoted to it. At a time when the judicial system of this

State, and especially that of Cook County, is striving to eliminate unacceptable delay in the disposition of cases, we should not needlessly add this additional burden and the burden of other multistate class actions that will surely follow as a result of this opinion.

One of the requirements of our class action statute is that the trial court find that "[t]he class action is an appropriate method for the *fair* and *efficient* adjudication of the controversy." (Emphasis added.) (Ill. Rev. Stat. 1979, ch. 110, par. 57.2(a)(4).) Upon remand I suggest that the trial court seriously consider the *fairness* of depriving other jurisdictions of the right to protect their own citizens under the circumstances of this case and likewise consider whether it is an *efficient* utilization of the resources of this State to litigate claims in which Illinois has no interest. In determining whether the action is manageable, the court should consider not whether it is manageable by the use of unlimited resources, but whether it is *reasonably* manageable under the circumstances of this particular case.

MR. JUSTICE UNDERWOOD joins in this dissent.

No. 79-1530

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT
(5th Division)

STEVEN MINER, Plaintiff-Appellant v. THE GILLETTE COMPANY, Defendant-Appellee

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Opinion filed October 3, 1980

Mr. JUSTICE WILSON delivered the opinion of the court:

Plaintiff brought this action on behalf of himself and a nationwide class action of persons alleging that defendant violated the Consumer Fraud and Deceptive Business Practices Act (Ill. Rev. Stat. 1977, ch. 121½, par. 261 *et seq.*) and breached its contractual obligation under Illinois law. This appeal was taken under Supreme Court Rule 308 from an interlocutory order of the circuit court dismissing the amended complaint insofar as it was brought in a representative capacity on behalf of nonresidents of the State of Illinois. This court also granted leave to the parties to brief and argue on cross-appeal the issue of whether this action could be brought in a representative capacity in any respect. We affirm the judgment of the circuit court.

FACTS

Plaintiff brought his action on behalf of approximately 180,000 consumers residing throughout the United States

alleging that they were unlawfully deceived by the Gillette Company (Gillette) in connection with the operation of the Accent Table Lighter Promotion.[1] Plaintiff alleged in count I of his complaint that Gillette fradulently induced plaintiff class members[2] to purchase Cricket lighters knowing its promotional offer of a free Accent table lighter with the purchase of two Cricket lighters was deceptive in that Gillette knew it did not have an adequate supply of Accent table lighters to fill its orders. This practice is alleged to be prohibited by the Consumer Fraud and Deceptive Business Practices Act (Ill. Rev. Stat. 1977, ch. 121½, par. 261 *et seq.*). In count II of the complaint, plaintiff alleges Gillette's refusal to comply with the terms of its offer and supply class members with free Accent lighters constitutes a breach of contract under Illinois law.

Gillette asserts that it became aware in September 1978 that response to the Accent Table Lighter Promotion would exceed its expectations. It therefore ceased shipping further promotional material and added an additional 70,000 Accent lighters assembled from available components to its supply. Nevertheless, there was still a deficit of approximately 180,000 lighters. Gillette then refunded the 50-cent postage and handling charge, and sent a free regular Cricket lighter with a letter stating the Accent lighters had been exhausted and apologizing for the inconvenience.

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[1] The campaign commenced in April 1978. The mail-in offer details provide: "Purchase two cricket lighters. Send in the words 'Cricket by Gillette' from any two packages as your proof of purchase plus the enclosed certificate and 50¢ for postage and handling. Gillette will mail you a FREE CRICKET ACCENT TABLE LIGHTER."

[2] The class of injured persons includes 11,456 residents of the State of Illinois and 168,124 nonresidents for a total of 179,580 class members.

Plaintiff was one of these consumers who received the Gillette letter. He filed suit on January 29, 1979. An amended complaint was filed in June 1979. In September 1979, the circuit court denied Gillette's motion to dismiss the action as a class action on behalf of Illinois residents, finding that the prerequisites of section 57.2 of the Civil Practice Act (Ill. Rev. Stat. 1977, ch. 110, par. 57.2) were satisfied, but granted Gillette's motion to dismiss the action as a class action on behalf of non-Illinois residents on the authority of *Spirek v. State Farm Mutual Automobile Insurance Co.* (1978), 65 Ill. App. 3d 440, 382 N.E.2d 111. The trial court recognized that its order limited membership in the plaintiff class solely to Illinois residents, and that this presented an important and unresolved question of law, and so certified the issue for immediate appeal pursuant to Supreme Court Rule 308. The court denied, however, Gillette's request to certify for immediate appeal under Rule 308 that part of the order which denied its motion to dismiss the Illinois class. Plaintiff submitted to this court an application for leave to appeal under Rule 308, which was denied on October 12, 1979. Plaintiff then filed a motion for direct appeal to the supreme court under Supreme Court Rule 302(b), which was denied on November 21, 1979. On November 23, 1979, plaintiff filed a petition with the supreme court for a motion to treat appellant's petition for leave to appeal pursuant to Supreme Court Rule 302(b) as an application for supervisory jurisdiction. The court then, in the exercise of its supervisory jurisdiction, ordered this court to grant plaintiff's application for leave to appeal. Consequently, in December 1979, we vacated our order of October 12, and allowed plaintiff's application for leave to appeal.

OPINION

Plaintiff argues that he should be allowed to bring this action as a class action suit on behalf of Illinois residents as well as on behalf of persons similarly situated residing outside the State of Illinois. Defendant contends this case does not justify invocation of class action procedures in any respect.

Plaintiff asks us to reconsider the legal propriety of the multistate class action and to reverse our decision in *Spirek* v. *State Farm Mutual Automobile Insurance Co.* (1978), 65 Ill. App. 3d 440, 382 N.E.2d 111, so that this action can proceed as such. In *Spirek*, we held that absent "minimum contacts" with an Illinois forum, an Illinois court could not render a binding *in personam* judgment over nonresident plaintiffs. The basis for the *Spirek* decision finds its support in the *International Shoe* doctrine which states that a nonresident is not subject to the jurisdiction of a State court unless he has certain "minimum contacts" or ties with the forum State. *International Shoe Co.* v. *Washington* (1945), 326 U.S. 310, 90 L. Ed. 95, 66 S. Ct. 154.

In *Spirek*, two Illinois residents sought to represent all State Farm policyholders, wherever located, who made defined medical payment claims. We refused to exercise such jurisdiction over all plaintiffs even though we had jurisdiction over defendant. In refusing to exercise jurisdiction, we discussed a number of due process and full faith and credit problems inherent in joining out-of-State plaintiffs: compelling plaintiffs to opt out of the class suit or risk a binding *in personam* judgment; no common question of law would predominate; numerous other States' laws would have to be applied; and any decision of the court would not

be binding on persons beyond its jurisdiction which would subject any judgment rendered to relitigation when enforcement was sought in a sister State's court.

Plaintiff relies on *Hoover* v. *May Department Stores* (1978), 62 Ill. App. 3d 106, 378 N.E.2d 762, *rev'd on other grounds* (1979), 77 Ill. 2d 93, 395 N.E.2d 541, *Schlosser* v. *Allis-Chalmers Corp.* (1978), 86 Wisc. 2d 226, 271 N.W.2d 879, and *Shutts* v. *Phillips Petroleum Co.* (1977), 222 Kan. 527, 567 P.2d 1292, as persuasive authority to allow nationwide plaintiff classes. These cases, however, are distinguishable. In *Hoover,* a class action was brought seeking relief for plaintiff charge account customers of defendant. The plaintiff sought to certify a class consisting of customers who resided in Illinois and Missouri. The class action was allowed even though a majority of its members resided outside the State of Illinois. It should be noted, though, that there were sufficient "minimum contacts" with Illinois as the vast majority of class members who were residents of Missouri shopped in defendant's stores both in Illinois and Missouri. Additionally, application of only two States' laws governed the class claims.

In *Shutts,* plaintiff sought to represent a class of gas royalty owners against the Phillips Petroleum Company to recover interest on "suspense royalties" attributed to gas produced from leases in a three-State area. The Kansas Supreme Court allowed the class action stating that the important element in exercising jurisdiction over a nonresident plaintiff is procedural due process which consists of notice, an opportunity to be heard, and where members' rights are protected by adequate representation. *Shutts,* at 1305.

But even in *Shutts,* there existed some "minimum contacts" with Kansas by virtue of a common interest in the equivalent of a "common fund" to claim damages for com-

mingling and use of the suspense royalties by Phillips. Further, only three States' laws would have been in issue.

In *Schlosser,* a class of retired, salaried nonunion employees brought an action against defendant-employer for breach of a contractual obligation to provide noncontributory life insurance benefits to class members over age 65. The class action was allowed even though some members of the plaintiff class worked and retired in States other than Wisconsin. It was noted, however, that company policy decisions, including the one in question, emanated from the home office in Wisconsin. Thus, nonresident class members had some "minimum contacts" with the forum State. It appears that even in these cases which plaintiff cites as persuasive authority for multistate class actions there is still consistency with the "minimum contacts" doctrine.

The case at bar presents the same problems that we faced in *Spirek* and requires us to refrain from exercising jurisdiction to adjudicate the claims of nonresidents whose interest plaintiff seeks to represent. The Illinois class action statute requires: (1) that the class is so numerous that joinder of all members is impracticable; (2) there are questions of fact or law common to the class which predominate over any questions affecting only individual members; (3) the representative parties will fairly and adequately protect the interest of the class; and (4) the class action is an appropriate method for the fair and efficient adjudication of the controversy. Ill. Rev. Stat. 1977, ch. 110, par. 57.2.

• 1 It is apparent that the class plaintiff seeks to represent is so numerous as to make joinder impracticable. In addition, a common question of fact predominates over any question affecting only individual members, and as to Illinois residents, a common question of law predominates also. However, it is evident that no common question of law predominates as to nonresidents. These plaintiffs have *no*

"contacts" with Illinois (*International Shoe Co.* v. *Washington* (1945), 326 U.S. 310, 90 L. Ed. 95, 66 S. Ct. 154), and to allow this action to proceed as a multistate class action would entail the application of the laws of the different States. Even where the statutory language of the different States' consumer fraud laws is similar to Illinois', the interpretation of this language may be construed differently by the courts of the various States. As such, the plaintiff may have difficulty in adequately representing the interests of all the purported class members. Thus, this proposed multistate class action, like the class action in *Spirek,* fails to meet the requirements of the Illinois class action statute. It must also be pointed out that any determination made by an Illinois court would have no binding effect beyond the jurisdiction of the Illinois courts and would be subject to relitigation in other jurisdictions whenever difficulty arose in enforcing the judgment in sister States' courts. Additionally, allowance of a multistate class action suit in Illinois would not necessarily bar similar actions in other States brought by other plaintiffs. As such, the practical utility of exercising jurisdiction and rendering a determination covering multistate claims is minimized. We are thus not persuaded that *Spirek* should be overruled to allow this action to proceed as a multistate class action.

We, therefore, affirm the trial court dismissal of the amended complaint insofar as it affects nonresident plaintiff members' claims.

We do, however, reject Gillette's contention that this matter does not merit invocation of the class action device in any respect. Gillette asserts in its brief that:

> "(1) the asserted claims plainly arise out of efforts of the defendant to benefit consumers, not to deceive or exploit them; (2) the defendant has, prior to institu-

> tion of the litigation, voluntarily adjusted the asserted claims in a fair and reasonable manner; and (3) the asserted claims are so small that they are exceeded by the costs of adjudication and administration."

We believe that as to plaintiff members who reside in Illinois, the requirements of the Illinois class action statute have been met and that the trial court did not err in denying the motion to dismiss in this regard. (*Spirek* v. *State Farm Mutual Insurance Co.* (1978), 65 Ill. App. 3d 440, 382 N.E.2d 111.) All well-pleaded facts are accepted as true on a motion to dismiss. *Steinberg v. Chicago Medical School* (1977), 69 Ill. 2d 320, 371 N.E.2d 634; *Goodman* v. *Regional Transportation Authority* (1976), 66 Ill. 2d 20, 360 N.E.2d 51.

The class of injured persons includes 11,456 Illinois residents which because of these numbers allegedly makes joinder impracticable. There are common questions of both law and fact which appear to clearly predominate as to Illinois residents. All Illinois plaintiff members allegedly performed in the same manner and suffered the same injury from Gillette's failure to perform. The basis of any lawsuit here would be the Consumer Fraud Act (Ill. Rev. Stat. 1977, ch. 121½, par. 261 *et seq.*) and Illinois contract law. The third requirement under the statute is that the representative party will fairly and adequately protect the interest of the class (*Steinberg;* Ill. Rev. Stat. 1977, ch. 110, par. 57.2(a)(3)). Allegedly, Miner can fulfill this role since his interests and those of other Illinois plaintiff members would appear to be identical.

• 2 Lastly, we deal with Gillette's argument that a class action is not appropriate because of the "de minimus" nature of the claims. We have allowed the maintenance of class action suits where the claims were small. See *Steinberg,* where a class action suit was allowed to recover a $15 application fee paid to a medical school in reliance on er-

roneously stated criteria for judging applications. See also *Perlman* v. *Time, Inc.* (1978), 64 Ill. App. 3d 190, 380 N.E.2d 1040, where we allowed a class action suit for the unfulfilled portion of magazine subscriptions valued at under $10. All section 57.2(a)(4) of the Civil Practice Act requires is that "the class action is an appropriate method for the fair and efficient adjudication of the controversy" (Ill. Rev. Stat. 1977, ch. 110, par. 57.2(a)(4)). We believe that "this class action would best serve the 'economies of time, effort and expense and promote the uniformity of decision and accomplish the other ends of equity and justice sought be allowed in these actions'. [Citation.]" (*Spirek* v. *State Farm Mutual Insurance Co.* (1978), 65 Ill. App. 3d 440, 452, 382 N.E.2d 111, 119), and thus meet this requirement of the statute (*Steinberg* v. *Chicago Medical School* (1977), 69 Ill. 2d 320, 371 N.E.2d 634.) Further, Gillette's assertion that it substituted one gratuity for another is untenable. There was no gratuity as Gillette did not give away the Accent lighter as a "gift." Consumers were required to fulfill the conditions of the offer by buying two Cricket lighters, sending in proofs of purchase plus 50¢ postage and handling.

Accordingly, we conclude that nonresidents of the State of Illinois should not be included as members of plaintiff class, but that the court did not err in refusing to dismiss the action with regard to members of plaintiff class residing in Illinois. We do not intend to express any opinion as to the merits but limit same to the ruling as to the sufficiency of the complaint.

For the foregoing reasons, we affirm the order of the trial court dismissing the nonresident members of the class and allowing this suit to stand as a class action as to Illinois residents and remand for further proceedings consistent with this opinion.

MEJDA and LORENZ, JJ., concur.

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS

COUNTY
DEPARTMENT

CHANCERY DIVISION

STEVEN MINER, individually and on behalf of all person similarly situated, *Plaintiff*, v. The Gillette Company, *Defendant*.	NO. 79 CH 567

ORDER

This matter coming on to be heard on defendant's motions (1) to dismiss the amended complaint insofar as it is brought in a representative capacity on behalf of any persons other than plaintiff, and (2) in the alternative, to dismiss the amended complaint insofar as it is brought in a representative capacity on behalf of persons who are not residents of the State of Illinois; and the Court having reviewed the briefs and affidavits and answers to interrogatories filed herein, and having heard the argument of counsel, and being fully advised in the premises,

FINDS that the requirements of Section 57.2 of the Illinois Civil Practice Act having been satisfied as to the Illinois residents sought to be represented by plaintiffs, this action may be maintained as a class action on their behalf.

THEREFORE, IT IS ORDERED:

(1) That defendant's motion to dismiss the amended complaint insofar as it is brought in a representative capacity on behalf of persons who are residents of the State of Illinois is hereby denied; and

(2) That defendant's motion to dismiss the amended complaint insofar as it is brought in a representative capacity on behalf of persons who are not residents of the State of Illinois is hereby granted on the authority of *Spirek v. State Farm Mutual Automobile Ins. Co.*, 65 Ill. App. 3d 440 (1978), and cases cited therein.

THE COURT FURTHER FINDS, pursuant to Supreme Court Rule 308, that the granting of defendant's alternative motion as set forth in Paragraph (2) of this Order involves a question of law as to which there is substantial ground for difference of opinion (namely, whether plaintiff may represent a class which includes persons who are not residents of the State of Illinois), and that an immediate appeal from this Order granting defendant's motion may materially advance the ultimate termination of the litigation.

September 17, 1979

ENTER: /s/ GEORGE L. SCHALLER
Judge

Sections 57.2 through 57.7 of the Illinois Civil Practice Act (Ch. 110, Pars. 57.2 through 57.7, Illinois Revised Statutes)

§ 57.2. Prerequisites for the maintenance of a class action. (a) An action may be maintained as a class action in any court of this State and a party may sue or be sued as a representative party of the class only if the court finds:

(1) The class is so numerous that joinder of all members is impracticable.

(2) There are questions of fact or law common to the class, which common questions predominate over any questions affecting only individual members.

(3) The representative parties will fairly and adequately protect the interest of the class.

(4) The class action is an appropriate method for the fair and effiicent adjudication of the controversy.

§ 57.3. Order and findings relative to the class. (a) *Determination of Class.* As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it may be so maintained and describe those whom the court finds to be members of the class. This order may be conditional and may be amended before a decision on the merits.

(b) *Class Action on Limited Issues and Sub-classes.* When appropriate, an action may be brought or maintained as a class action with respect to particular issues, or divided into sub-classes and each sub-class treated as a class. The provisions of this rule shall then be construed and applied accordingly.

§ 57.4. Notice in class actions. Upon a determination that an action may be maintained as a class action, or at any time during the conduct of the action, the court in its discretion may order such notice that it deems necessary to protect the interests of the class and the parties.

An order entered under paragraph (a) of Section 57.3, determining that an action may be maintained as a class action, may be conditioned upon the giving of such notice as the court deems appropriate.

§ 57.5. Intervention by and exclusion of class members. (a) *Intervention.* Any class member seeking to intervene or otherwise appear in the action may do so with leave of court and said leave shall be liberally granted except when the court finds that said intervention will disrupt the conduct of the action or otherwise prejudice the rights of the parties or the class.

(b) *Exclusion.* Any class member seeking to be excluded from a class action may request such exclusion and any judgment entered in the action shall not apply to persons who properly request to be excluded.

§ 57.6. Judgments in class action. Any judgment entered in a class action brought under Section 57.2 shall be binding on all class members, as the class is defined by the court, except those who have been properly excluded from the class under paragraph (b) of Section 57.5.

§ 57.7 Dismissal or compromise of class actions. Any action brought as a class action under Section 57.2 shall not be compromised or dismissed except with the approval of the court and, unless excused for good cause shown, upon notice as the court may direct.

STATEMENT PURSUANT TO SUPREME COURT RULE 28.1

Petitioner The Gillette Company has no parent companies, subsidiaries other than wholly owned subsidiaries, or affiliates, other than the following:

Name	% Ownership
Gillette do Brasil Limitada	
Its subsidiary:	
Ruby Participacoes Ltda.	
Its subsidiary:	
Fritz Johansen S.A. Industria de Lapis e Produtos de Papelaria	96.5%
Inter-Nile Manufacturing Company S.A.E.	70%
S. T. Dupont	95.4%
Its subsidiaries:	
S. T. Dupont Limited	
Cricket	
S. T. Dupont Italia S.p.A.	
S. T. Dupont Japon K. K.	
S. T. Dupont S. A.	
S T. Dupont Corporation	
Gillette France	99.9%
Its subsidiary (jointly owned with Braun Electric France S.A., below):	
Gramagift	
Societe Francaise d'Appareillages et d'Instruments de Mesure	99.9%
Braun Aktiengesellschaft	99.16%
Its subsidiaries:	
Braun Argentina Sociedad Anonima	
Braun Industries Pty. Limited	
Braun Electric Austria Gesellschaft mbH	
Braun do Brasil Produtos Eletronicos Limitada	
Braun Canada Ltd./Ltee	
Braun Electric A/S	
Braun Electric (U.K.) Limited	
Braun Electric Finska AB	

Name	% Ownership
Braun Electric France S. A.	
Consul GmbH	
Braun Electric Nederland B. V.	
Braun Ireland Limited	
Braun Italia S.r.l.	
Braun Japan Kabushiki Kaisha	
Braun de Mexico, S.A. de C.V.	49%
Braun Norge A/S	
Braun Espanola, Sociedad Anonima	
Its subsidiary:	
Industrias Pimer, S. A.	
Braun Electric Svenska AB	
Braun Electric International SA	
Braun Shaver Service U. S., Inc.	
Braun Electronic Gesellschaft mit beschrankter Haftung	80%
S. T. Dupont Deutschland Gesellschaft mit beschrankter Haftung	99.1%
Gillette Continental Trading G.m.b.H.	50%
P. T. Morgen	90%
Sherkat Towlidi Lamiran (Sahami Aam)	45.5%*
Jamaica Razor Blade Company Limited	80%
Interproducts Kenya Limited	85.6%
Moorgate Industries Sdn. Berhad	60%
Inmo-Jafra Mexicana, S.A. de C.V.	49%
Jafra Cosmetics, S.A. de C.V.	49%
Plumibol, S.A. de C.V.	49%
Societe Interlame du Maroc S.A.	80%
Its subsidiary:	
Intermaghreb	50%

* Of which 10% owned by The Gillette Company and the balance by its subsidiaries Compania Giva, S.A. (10%), The Gillette Company Research Institute (10%), Gillette (Japan) Inc. (10%), Gillette Safety Razor Company (5.5%).

Joint Appendix

Office - Supreme Court, U.S.
FILED
JUN 1 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1493

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

THE GILLETTE COMPANY,

Petitioner,

v.

STEVEN MINER,

Respondent.

On Writ Of Certiorari To
The Supreme Court Of The State Of Illinois

JOINT APPENDIX

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Petition for Certiorari Filed February 9, 1982
Certiorari Granted April 5, 1982

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January 29, 1979—Complaint filed

March 19, 1979—Motion to Dismiss filed

April 20, 1979—Plaintiff's First Set of Interrogatories filed

May 25, 1979—Answers and Objections to Plaintiff's First Set of Interrogatories filed

June 7, 1979—Order entered granting plaintiff leave to file Amended Complaint

June 7, 1979—Amended Complaint filed

June 29, 1979—Corrections to Answers to Plaintiff's First Set of Interrogatories filed

July 9, 1979—Motion to Dismiss Amended Complaint filed

August 2, 1979—Order entered granting defendant leave to (1) withdraw portion of its Motion to Dismiss Amended Complaint, (2) file Answer to the Amended Complaint, and (3) file Affidavit of Robert J. Evans in support of motion to dismiss, and requiring filing of supplemental affidavit

August 2, 1979—Answer to Amended Complaint filed

August 2, 1979—Affidavit of Robert J. Evans filed

September 6, 1979—Supplemental Affidavit of Robert J. Evans filed

September 17, 1979—Order entered (1) denying motion to dismiss amended complaint insofar as it is brought on behalf of Illinois residents and (2) granting motion to dismiss amended complaint insofar as it is brought on behalf of nonresidents

Excerpts From Docket
In The Illinois Appellate Court, First District,
No. 79-1530

September 27, 1979—Application for Leave to Appeal Pursuant To Supreme Court Rule 308

October 12, 1979—Order denying application for leave to appeal

October 15, 1979—Answer to Application for Leave to Appeal

December 4, 1979—Order, pursuant to direction of Supreme Court, vacating order of October 12, 1979, and allowing application for leave to appeal

January 4, 1980—Order allowing motion of appellee for leave to brief and argue the question whether this action is maintainable as a class action in any respect

January 25, 1980—Appellant's brief

March 3, 1980—Appellee's brief

March 24, 1980—Appellant's reply brief

April 18, 1980—Appellee's reply brief

July 22, 1980—Oral argument

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Excerpts From Docket
In The Illinois Supreme Court,
No. 52704

November 15, 1979—Motion by appellant for direct appeal to this Court under Rule 302(b)

November 21, 1979—The motion by appellant for direct appeal to this Court under Rule 302(b) is denied without prejudice to filing a petition for leave to appeal

November 27, 1979—Motion by appellant to treat his motion for direct appeal under Rule 302(b) as an application for exercise of this Court's supervisory jurisdiction

November 30, 1979—The motion by appellant to treat his motion for direct appeal under Rule 302(b) as an application for exercise of this Court's supervisory jurisdiction is allowed. In the exercise of this Court's supervisory jurisdiction, it is ordered that the Appellate Court for the First District vacate its former order denying a petition for leave to appeal under Rule 308 from the order of the Circuit Court of Cook County in cause No. 79 CH 567 dismissing plaintiff's complaint in part, and enter an order allowing such petition

Excerpts From Docket
In The Illinois Supreme Court,
No. 54211

November 26, 1980—Petition for appeal filed

January 30, 1981—Leave to appeal allowed

February 13, 1981—Petition to stand as appellant's brief

March 13, 1981—Circuit Court record filed

March 13, 1981—Appellate Court record filed

March 20, 1981—Appellee brief filed

April 3, 1981—Appellant's reply brief filed

April 9, 1981—Order, Ward, J., dated April 7, 1981: Grants Consumer Coalition leave to file a brief amicus curiae and grants appellee leave to file a supplemental brief within ten days if so desired

April 9, 1981—Amicus curiae brief filed

April 17, 1981—Appellee's reply brief filed

May 27, 1981—Submitted

November 13, 1981—Judgments affirmed in part, reversed in part, and remanded

December 7, 1981—Mandate issued

December 7, 1981—Motion by amicus curiae, Consumer Coalition, for modification of opinion

January 12, 1982—The above motion was denied

IN THE

CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT—CHANCERY DIVISION

STEVEN MINER, individually and on behalf of all persons similarly situated, *Plaintiff,* v. THE GILLETTE COMPANY, *Defendant.*	No. 79 CH 567 CLASS ACTION

AMENDED COMPLAINT FOR ACCOUNTING AND OTHER EQUITABLE RELIEF

Now comes plaintiff, Steven Miner, individually and on behalf of all persons similarly situated, by his attorneys Bernstein & Waller and Freeman, Atkins & Coleman, Ltd., and complaining of the defendant, The Gillette Company, states as follows:

COUNT I

(1) That the plaintiff was a resident of the City of Chicago, County of Cook and State of Illinois, at all times hereinafter stated.

(2) That the defendant is a Delaware corporation authorized to do business in the State of Illinois.

(3) That the defendant is in the business of selling to the public, among other items, razor blades, Cricket butane lighters, and other items.

(4) Commencing in approximately April of 1978, defendant Gillette, for the purpose of increasing sales of its Cricket butane lighter, instituted an extensive sales campaign under which the defendant offered members of the

public a "free" Accent table lighter with the purchase of two Cricket lighters; details of the promotional offer set forth below appeared on the reverse side of the display pack; a copy of both sides of the Cricket display pack is attached hereto as Exhibit A:

Mail-in Offer Details:

> "Purchase two Cricket lighters. Send in the words 'Cricket by Gillette' from any two packages as your proof of purchase plus the enclosed certificate and 50¢ for postage and handling. Gillette will mail you a FREE CRICKET ACCENT TABLE LIGHTER."

(5) That at the time of commencement of defendant's unconditional promotional offer defendant knew, or in the exercise of due care should have known, that it would be unable to fill all orders it received for the Accent table lighter.

(6) The defendant caused its promotional campaign described above to be extensively advertised in the media, as well as through store displays made available to retailers, without in any way advising or notifying prospective customers and/or retailers that supplies of the Accent table lighter were limited or that the supply of same might not be adequate to meet the demand.

(7) Notwithstanding the fact that defendant Gillette soon after its promotional campaign was initiated became aware of the fact that it would not have an adequate supply of Accent table lighters available to fill orders received from members of the public accepting defendant's unconditional offer, it fraudulently and deceptively concealed such fact from prospective purchasers by continuing to extensively advertise and promote its "free" Cricket promotional offer, taking no steps to acquire an additional supply of Accent table lighters nor withdrawing its offer.

(8) Defendant Gillette failed and refused to supply approximately 180,000 persons who sent in the appropriate remittances to Gillette for their free Accent lighter; said persons received a notice from Gillette that its supply of Accent table lighters had been exhausted. A copy of said notice which defendant mailed to persons who accepted its offer but who were not supplied with the Accent table lighter is attached hereto and marked Exhibit B.

(9) This action is being brought by this named plaintiff individually and in his representative capacity on behalf of all persons who accepted Gillette's promotion offer of a "free" Accent table lighter by purchasing two Cricket lighters and by remitting 50 cents and proof of purchase in compliance with the terms of same, but who were not supplied with the Accent table lighter offered by the defendant. The members of the class are so numerous as to make it impractical to bring them all before the Court. It is estimated that there are approximately 180,000 members of the plaintiff class in that approximately 178,760 requests for the free Accent table lighter have not been honored by Gillette. The rights of the members of the class involve common questions of law and fact which predominate over any questions affecting individual members alone. The claims of the plaintiff herein are typical of those to be asserted for the class. Plaintiff will fairly and adequately protect the interest of the class. This class action is superior to other methods for the fair and efficient adjudication of the controversy described herein.

(10) Plaintiff, on or about September 24, 1978, having purchased two Cricket lighters in accordance with Gillette's promotional offer described herein and having fully complied with and performed the terms of same by remitting 50 cents and proof of purchase to defendant Gillette, failed

to be supplied with said Accent lighter by defendant; plaintiff and members of plaintiff class received no notice of the fact that supplies of Accent table lighters were limited or that their orders would not be filled until he and members of plaintiff class received the notice hereinabove referred to and marked Exhibit B.

(11) That the aforesaid conduct of Gillette constituted an "unfair and deceptive act or practice" prohibited by the Consumer Fraud and Deceptive Business Practices Act (Ch.121½, § 262, Ill. Rev. Stats.), which consisted of unfairly, deceptively and fraudulently advertising and promoting sales of Cricket lighters tied to an unconditional offer of a "free" Accent table lighter, while at the same time concealing the fact that the lighter could not be supplied to plaintiff and members of plaintiff class.

(12) That the practice and conduct of the defendant in promoting sales of its Cricket lighter in the manner described above caused plaintiff and each member of plaintiff class to sustain damages in an amount of $8.10 in that they were denied the benefits of the contract they in good faith performed, namely the acquisition of an Accent table lighter, which lighter according to defendant had a retail value of $7.95 plus mailing costs of 15 cents in remitting proof of purchase to defendant.

(13) As described above, defendant Gillette willfully, intentionally and fraudulently induced more than 419,000 persons to accept its promotional offer of a free Accent table lighter and thereby caused more than 838,000 Cricket lighters to be sold to members of plaintiff class, well knowing that defendant would obtain large sums of money resulting therefrom, by deceiving members of the public who purchased defendant's Cricket lighters believing they would receive a "free" Accent table lighter, in total disregard of the rights of the public, thereby entitling plaintiff

and members of plaintiff class to an award of punitive damages.

WHEREFORE, plaintiff and members of plaintiff class pray as follows:

A. That this Court adjudge and decree that defendant Gillette's conduct constituted a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act, Ch. 121½, § 262, Ill. Rev. Stats.

B. That this Court decree that this action may be properly maintained as a class action.

C. That this Court decree that plaintiff and members of plaintiff class are entitled to an accounting in connection with all orders of Accent table lighters which defendant has failed to supply to plaintiff and members of plaintiff class in order to determine the amount owing plaintiff and members of plaintiff class resulting from the wrongful action of defendant herein, including profits obtained from sales of its Cricket lighters while "tied" to the "Accent" table lighter promotion and monies improperly obtained from sales and use of lists of names of persons accepting defendant's promotional offer.

D. That this Court award punitive damages to plaintiff class amounting to $1,500,000.

E. That, in accordance with the Illinois Statutes and law in such cases made and provided, such costs of prosecution of this suit and reasonable attorneys' fees be awarded to the attorneys for the class, and for such other relief as the Court may deem just and equitable.

COUNT II

(1)-(10) Plaintiff realleges and incorporates by reference Paragraphs (1) through (10) of Count I as Paragraphs (1) through (10) of Count II.

(11) That defendant's offer described above constituted a clear, definite, and explicit offer for a contract, leaving nothing open for negotiation.

(12) That plaintiff and members of plaintiff class accepted the defendant's offer through their performance as described in Paragraph (10) of Count I, thereby creating a binding contract.

(13) That at no time before performance was tendered by plaintiff and members of plaintiff class did defendant attempt to revoke said offer or give any notice to plaintiff of revocation.

(14) That commencing in approximately December, 1978, after plaintiff and members of plaintiff class had accepted defendant's offer by performance as described above they received from defendant, or defendant's agent, a notice advising them that supply of the lighters had been exhausted (see Exhibit B attached hereto); that such action on the part of defendant, in failing and refusing to comply with the unconditional offer to the plaintiff made by defendant, constitutes a breach of contract.

(15) In disregard of its duty to deal in good faith with plaintiff and members of plaintiff class, defendant Gillette failed and refused to make its offer and perform its contractual obligations in good faith.

(16) Plaintiff realleges and incorporates by reference Paragraph (12) of Count I as Paragraph (16) of Count II.

WHEREFORE, plaintiff prays as follows:

A. That the defendant be required to account for all Accent table lighters which defendant promised to deliver to offerees, including the plaintiff, who accepted defendant's offer for a contract.

B. That the plaintiff and all members of the plaintiff class each be awarded damages equal to the $7.95 retail value of said Accent lighters plus 15 cents covering postage.

C. That this Court order and declare that this case is an appropriate class action.

D. That, in accordance with the law in such cases made and provided, costs of prosecution of this suit and reasonable attorneys' fees be awarded to the attorneys for the class, and for such other relief as the Court may deem just and equitable.

FREEMAN, ATKINS & COLEMAN, LTD.

By: ROBERT S. ATKINS
One of Plaintiff's Attorneys

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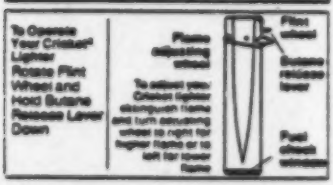
HENRY A. WALLER
BERNSTEIN & WALLER
123 West Madison Street
Chicago, Illinois 60602
782-8400

MAIL IN
OFFER DETAILS:

Purchase 2 Cricket® lighters. Send in the words "Cricket by Gillette" from any 2 packages as your proof of purchase plus the enclosed certificate and 50¢ for postage and handling. Gillette will mail you a FREE Cricket® Accent Table Lighter.



Fully Guaranteed — Your Cricket lighter is guaranteed to give you complete satisfaction. If it does not, please write to The Gillette Company, Safety Razor Division, Gillette Park, Boston, Mass. 02106. Gillette will replace it at no cost to you.

Distributed by The Gillette Company, Safety Razor Division, Boston, Mass. 02106, U.S.A. Cricket® is a registered trademark of S.T. Dupont S.A. Paris, France.

Danger—Contains butane gas. Extremely flammable. Keep away from heat and fire. Keep away from face when lighting. After use, be sure flame is completely extinguished. Do not puncture or incinerate. Contents under pressure.

KEEP OUT OF REACH OF CHILDREN

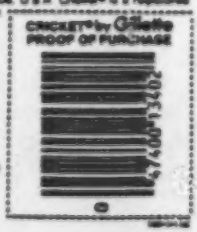


EXHIBIT A.

Dear Consumer:

We have received your request for the Cricket Accent Lighters, but I am sorry to inform you that the overwhelming demand on this promotion has exhausted our supply.

We are, therefore, returning your 50 cents and in the hope of reducing your disappointment, we are enclosing a lighter compliments of Cricket. I am sorry for any inconvenience and would like to thank you for purchasing Cricket.

Sincerely,

SPOTTS INTERNATIONAL
P.O. Box 9300
St. Paul, MN 55193
Handling Organization
for Gillette Cricket Program

EXHIBIT B.

IN THE

CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT—CHANCERY DIVISION

[Caption omitted in printing]

ANSWERS AND OBJECTIONS
TO PLAINTIFF'S
FIRST SET OF INTERROGATORIES

NOW COMES defendant THE GILLETTE COMPANY, by its attorneys, and for its Answers and Objections to Plaintiff's Interrogatories, states as follows:

INTERROGATORY NO. 1

During what period of time did defendant offer to the public a "Free Cricket Accent Table Lighter" in connection with the sale of defendant's Cricket disposable lighter?

ANSWER: Factory shipments of the promotion blister pack and display commenced April 1978, and the merchandise reached retail shelves in late April or early May. The promotion was also advertised on June 21 and 22, 1978. In early September, 1978, when it began to appear that the return on promotions might eventually exceed expectations, shipments of the promotional package were ceased.

INTERROGATORY NO. 2

State the number of requests for the "Free Cricket Accent Table Lighter" received by defendant or any of its agents.

ANSWER: Four Hundred Twenty Thousand One Hundred Ninety-six (420,196), as of April 20, 1979.

[Nos. 3 and 4 omitted in printing because of subsequent correction or revision]

INTERROGATORY NO. 5

State by date when persons requesting the "Free Cricket Accent Table Lighter" pursuant to the offer described above were first notified that their order could not be filled.

ANSWER: The letter attached as Exhibit A to the Complaint [Exhibit B to the Amended Complaint] was mailed commencing December 15, 1978.

INTERROGATORY NO. 6

During what period of time were members of the public notified that their orders for the "Free Cricket Accent Table Lighter" pursuant to the above could not be filled?

ANSWER: The letter attached as Exhibit A to the Complaint has been sent since December 15, 1978 until this date.

INTERROGATORY NO. 7

Describe by date the total number of "Free Cricket Accent Table Lighters" purchased by defendant and dates of such purchases.

OBJECTION: Defendant objects to Interrogatory No. 7 at this time on the grounds that it is not relevant to the pending motion or class certification, and may have accordingly become moot.

INTERROGATORY NO. 8

Describe in detail the relationship of Spotts International to The Gillette Company and the nature of services performed on behalf of Gillette in connection with the Gillette-Cricket program.

ANSWER: Spotts International was acting as Gillette's agent in connection with the Accent Lighter promotion,

with respect to the receipt of proofs of purchase, the distribution of Accent Lighters and subsequently, the distribution of the letter attached to the Complaint as Exhibit A and the 50 cents and Cricket Lighter enclosed therewith.

INTERROGATORY NO. 9

Identify the person or persons who supervised and/or directed on behalf of defendant the administration of the Gillette-Cricket program and the promotional offer described above.

OBJECTION: Defendant objects to Interrogatory No. 9 at this time on the grounds that it is not relevant to the pending motion to class certification, and may accordingly become moot.

INTERROGATORY NO. 10

Describe in detail efforts made by defendant to obtain Cricket Accent Table Lighters for the purpose of filling the orders received.

OBJECTION: Defendant objects to Interrogatory No. 10 at this time on the grounds that it is not relevant to the pending motion or to class certification, and may accordingly become moot.

[Nos. 11 and 12 omitted in printing because of subsequent correction or revision]

THE GILLETTE COMPANY

By SIDLEY & AUSTIN
Its Attorneys

Sidley & Austin
One First National Plaza
Suite 4500
Chicago, Illinois 60603
(312) 329-5400

VERIFICATION

I, Samuel N. Schell, being duly sworn, depose and say that I am President of the Safety Razor Division of The Gillette Company, that I have read the foregoing Answers to Plaintiff's First Set of Interrogatories, that I am familiar with the matters noted therein, and that those answers are true to the best of my knowledge, information and belief.

SAMUEL N. SCHELL

Subscribed and sworn
before me this 24th day
of May, 1979.

ELIZABETH A. WILSON
Notary Public

My Commission Expires: 12/13/79

[Certificate of service omitted in printing]

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT—CHANCERY DIVISION

[Caption omitted in printing]

CORRECTIONS TO ANSWERS TO PLAINTIFF'S FIRST SET OF INTERROGATORIES

Defendant The Gillette Company hereby corrects its answers to Plaintiff's First Set of Interrogatories previously filed herein as follows:

INTERROGATORY NO. 3

State the number of "Free Cricket Accent Table Lighters" sent to members of the public in accordance with the offer described above.

CORRECTED ANSWER: Pursuant to its promotion, Gillette sent 241,436 Accent Lighters to members of the public.

INTERROGATORY NO. 4

State the number of requests for the "Free Cricket Accent Table Lighter" referred to above which were not filled by defendant.

CORRECTED ANSWER: One Hundred Seventy Eight Thousand Seven Hundred Sixty (178,760), as of April 20, 1979.

INTERROGATORY NO. 11

State the number of 50 cent refunds sent to persons whose orders for the "Free Cricket Accent Table Lighter" count [sic] not be filled.

CORRECTED ANSWER: One Hundred Fifty Two Thousand Four Hundred Twenty Three (152,423), as of April 20, 1979.

THE GILLETTE COMPANY

By SIDLEY & AUSTIN
Its Attorneys

SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 329-5400

VERIFICATION

I, Samuel N. Schell, being duly sworn, depose and say that I am President of the Safety Razor Division of The Gillette Company, that I have read the foregoing Corrections to Answers to Plaintiff's First Set of Interrogatories, that I am familiar with the matters noted therein, that those corrected answers are true to the best of my knowledge, information and belief, and that my previous verification of the original answers to such interrogatories should be amended to conform to such corrections.

SAMUEL N. SCHELL
Samuel N. Schell

SUBSCRIBED AND SWORN to
before me this 20th day
of June, 1979.

MARY C. MULLEN
Notary Public

[Proof of service omitted in printing]

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT—CHANCERY DIVISION

[Caption omitted in printing]

MOTION TO DISMISS AMENDED COMPLAINT

Defendant The Gillette Company hereby moves this Court, pursuant to Section 45 of the Illinois Civil Practice Act, Ch. 110, Sec. 45, Ill. Rev. Stat., that the amended complaint in this action be dismissed in its entirety for the reason that it is substantially insufficient in law in the following respects:

a. Count I of the amended complaint fails to state a cause of action under the Illinois Consumer Fraud Act in that there is no allegation that plaintiff suffered damage as a result of Gillette's conduct, or of facts sufficient to establish any deceptive practice in light of the common understanding of advertising promotions.

b. Count II of the amended complaint fails to state a cause of action for breach of contract in that there is no allegation of consideration to support a contract, or of facts sufficient to create any contract or to establish a breach of any contract in light of the common understanding of advertising promotions.

As stated to the Court on June 7, 1979, and as contemplated by the Court's order of that date, Defendant The Gillette Company also moves, pursuant to Sections 45 and 48 of the Illinois Civil Practice Act, Ch. 110, Secs. 45 and 48, Ill. Rev. Stat., that the amended complaint in this action be dismissed on the grounds stated in paragraphs 2 and 3 of defendant's motion to dismiss the original complaint in this action, which paragraphs are as follows:

"2. That the complaint be dismissed insofar as it is brought in a representative capacity on behalf of persons other than plaintiff for the reason, among others, that any common questions presented by the claims of other persons sought to be represented do not predominate over questions affecting such persons individually.

"3. That the complaint be dismissed insofar as it is brought in a representative capacity on behalf of persons who are not residents of the State of Illinois because this Court has no jurisdiction to adjudicate the claims of such persons, the claims of such persons do not share common questions with the claim of plaintiff, and plaintiff cannot fairly and adequately protest [sic] the interests of such persons."

Respectfully submitted,

By SIDLEY & AUSTIN

Sidley & Austin
One First National Plaza
Chicago, Illinois 60603
(312) 329-5400

Attorneys for defendant
The Gillette Company

Of Counsel:
RUSSELL M. BAIRD
GEORGE A. PLATZ
SHALOM L. KOHN

[Proof of service omitted in printing]

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT—CHANCERY DIVISION

[Caption omitted in printing]

ORDER

This matter coming on to be heard on defendant's motion for leave to withdraw motion, to file answer, and to file affidavit, and the Court being fully advised, IT IS ORDERED

1. That defendant be granted leave to withdraw without prejudice that portion of its Motion To Dismiss Amended Complaint heretofore filed in this action which seeks dismissal of the Amended Complaint as substantially insufficient in law.

2. That defendant be granted leave to file *instanter* its Answer to the Amended Complaint.

3. That defendant be granted leave to file *instanter* the Affidavit of Robert J. Evans in support of defendant's motion to dismiss this action insofar as it is brought in a representative capacity on behalf of persons who are not residents of the State of Illinois.

4. That defendant shall file a supplemental affidavit on or before August 31, 1979, indicating by state the number of requests for Accent lighters which have not been filled.

5. That this matter is set for status report at 10:30 a.m. on September 6, 1979.

6. That the hearing in this matter previously set for August 8, 1979, is cancelled.

ENTER: GEORGE L. SCHALLER
Judge

August 2, 1979

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT—CHANCERY DIVISION

[Caption omitted in printing]

ANSWER OF DEFENDANT THE GILLETTE COMPANY TO THE AMENDED COMPLAINT

Defendant The Gillette Company hereby answers the allegations of the Amended Complaint herein as follows:

COUNT I

1. Defendant is without information sufficient to form a belief as to the truth of the allegations of paragraph 1 of Count I.

2. Defendant admits the allegations of paragraph 2 of Count I.

3. Defendant denies the allegations of paragraph 3 of Count I except as hereinafter stated. Defendant states that it sells razor blades, Cricket butane lighters and other items to wholesale and retail customers for ultimate resale to the public.

4. Defendant denies the allegations of paragraph 4 of Count I except as hereinafter stated. Defendant states that commencing in approximately April of 1978, defendant instituted an Accent Table Lighter Promotion, the terms of which are set forth on Exhibit A to the Amended Complaint, which speaks for itself; and that the purpose of such promotion was to generate interest in and increase the goodwill of the trade and of consumers toward Gillette and the Cricket lighter in particular.

5. Defendant denies the allegations of paragraph 5 of Count I. Further answering, defendant states that at the

time of commencement of defendant's Accent Table Lighter Promotion it projected, based upon experience with prior promotions involving Cricket lighters, that it would receive approximately 156,000 requests for Accent table lighters; and that at such time defendant had on hand in excess of 200,000 Accent table lighters.

6. Defendant denies the allegations of paragraph 6 of Count I except as hereinafter stated. Defendant states that it caused the Accent Table Lighter Promotion to be advertised in newspapers in a number of cities throughout the United States on June 21 and June 22, 1978; and that it sold Cricket lighters in individual packages describing the Promotion to retailers in open stock and in cardboard stands describing the promotion, which stands were to be discarded after the lighters therein were sold.

7. Defendant denies the allegations of paragraph 7 of Count I. Further answering, defendant states that in early September, 1979, defendant first became aware that the response to the Accent Table Lighter Promotion might exceed the original projections; that defendant thereupon ceased shipments of any further materials referring to the promotion; and that defendant thereupon caused additional Accent table lighters to be assembled from all available components, thereby adding approximately 70,000 Accent table lighters to its supply.

8. Defendant denies the allegations of paragraph 8 of Count I except as hereinafter stated. Defendant states that because of the extraordinary and unexpected response to its Accent Table Lighter Promotion and the extremely long periods necessary to manufacture any further Accent table lighters after assembling all available components, defendant was unable to supply Accent table lighters to approximately 180,000 persons who requested them pursuant to the

Accent Table Lighter Promotion; and that defendant caused to be mailed to such persons a refund of their 50 cent postage and handling charge, a free regular Cricket lighter, and the letter a copy of which is attached as Exhibit B to the Amended Complaint.

9. Defendant denies the allegations of paragraph 9 of Count I except as hereinafter admitted. Defendant admits that plaintiff purports to bring this action as a representative action but denies that he is entitled to do so. Defendant admits that there are approximately 180,000 persons who requested Accent table lighters pursuant to the Accent table lighter promotion but did not receive them and that it would be impractical to bring 180,000 persons before the Court, but denies that such persons constitute a proper class.

10. Defendant denies the allegations of paragraph 10 of Count I except as hereinafter stated. Defendant states that it is without information sufficient to form a belief as to the alleged acts by plaintiff; that defendant did not supply an Accent table lighter to plaintiff; and that defendant did send to plaintiff the letter attached as Exhibit B to the Amended Complaint.

11. and 13. Defendant denies the allegations of paragraphs 11 and 13. Further answering, defendant states that its primary concern is and was the goodwill of its customers and distributors, that the Accent Table Lighter Promotion was made to enhance that goodwill towards the company and the Cricket lighter, that the refund and free lighter given to those not receiving the Accent Table Lighter recognized the Company's interest in retaining the goodwill of its customers and that the plaintiff's allegations of fraudulent and deceitful conduct totally contradict the

obvious intention of the Company as clearly illustrated by the offer and the subsequent actions of the Company.

12. Defendant denies the allegations of paragraph 12 of Count I. Further answering, defendant states that neither plaintiff nor any person he purports to represent paid a higher price for Cricket lighters because of the Accent Table Lighter Promotion than they would have paid in the absence of such promotion; that plaintiff and such persons have had the full use of any Cricket lighters purchased by them because of such promotion; that defendant has returned to plaintiff and to each such person the full 50 cent mailing and handling charge remitted by them; and that defendant has in addition sent to plaintiff and each such person a free regular Cricket lighter, so that plaintiff and the persons he purports to represent have not suffered any damage from participating in the Accent Table Lighter Promotion but have instead received a benefit.

FIRST AFFIRMATIVE DEFENSE TO COUNT I

The allegations of Count I fails to state a cause of action under the Illinois Consumer Fraud Act in that there is no allegation that plaintiff suffered damage as a result of defendant's conduct, or of facts sufficient to establish any deceptive practice in light of the common understanding of advertising promotions.

SECOND AFFIRMATIVE DEFENSE TO COUNT I

Defendant tendered to plaintiff and to each person whom plaintiff purports to represent a return of the 50 cent handling charge and a regular Cricket lighter, which tender was accepted by plaintiff and such persons. Such acceptance constituted a rescission, satisfaction, or mutual abandon-

ment of any claims by plaintiff or such persons against defendant.

COUNT II

1.-10. For its answers to paragraphs 1 through 10 of Count II, defendant repeats and realleges its answers to paragraphs 1 through 10 of Count I.

11.-13. Defendant denies the allegations of paragraphs 11 through 13 of Count II.

14. Defendant denies the allegations of paragraphs 14 of Count II except as hereinafter stated. Defendant states that commencing in December, 1978, it caused the letter attached as Exhibit B to the Amended Complaint to be sent to persons who had responded to the Accent Table Lighter Promotion whose requests could not be filled.

15.-16. Defendant denies the allegations of paragraphs 15 and 16 of Count II.

FIRST AFFIRMATIVE DEFENSE TO COUNT II

The allegations of Count II fail to state a cause of action in that there is no allegation of consideration to support a contract, or of facts sufficient to create any contract or to establish a breach of any contract in light of the common understanding of advertising promotions.

SECOND AFFIRMATIVE DEFENSE TO COUNT II

Defendant tendered to plaintiff and to each person whom plaintiff purports to represent a return of the 50 cent handling charge and a regular Cricket lighter, which tender was accepted by plaintiff and such persons. Such acceptance constituted a rescission, satisfaction, or mutual abandonment of any claims by plaintiff or such persons against defendant.

WHEREFORE, defendant The Gillette Company prays that judgment be entered denying all relief sought by plaintiff, dismissing the Amended Complaint with prejudice, and awarding defendant its costs herein.

THE GILLETTE COMPANY

By SIDLEY & AUSTIN

Sidley & Austin
One First National Plaza
Chicago, Illinois 60603
(312) 329-5400

Its Attorneys

Of Counsel:
RUSSELL M. BAIRD
GEORGE A. PLATZ
SHALOM L. KOHN

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT—CHANCERY DIVISION

[Caption omitted in printing]

AFFIDAVIT OF ROBERT J. EVANS

Robert J. Evans, being duly sworn, deposes and says:

1. I am employed by The Gillette Company in its Advertising Services Division as the Manager, Promotion Services. I have held this position for over a year. I was Associate Manager, Promotion Services, for three years prior thereto. As part of my duties, I am responsible for supervising Gillette promotions and for monitoring consumer requests for redemption of Gillette promotions, and I have performed these tasks with respect to the Accent Table Lighter Promotion. The matters stated herein are within my own personal knowledge.

2. The Accent Table Lighter Promotion was conducted by Gillette in all 50 states of the United States. Consumer requests for the Accent table lighter pursuant to such promotion which Gillette has been unable to fulfill because of the depletion of stock have been received from persons with addresses in all such states, with substantial numbers of requests coming from most states.

3. The corporate headquarters of The Gillette Company are located in Boston, Massachusetts. The Gillette employees who planned and executed the Accent Table Lighter Promotion were all located at such corporate headquarters or at Safety Razor Division, Gillette Park, South Boston, Massachusetts.

4. The actual handling of the Accent Table Lighter Promotion was performed by Spotts International, St. Paul, Minnesota. The performance by Spotts International, which included receipt and processing of consumer requests and mailing of responses, took place in the State of Minnesota.

5. No aspect of the Accent Table Lighter Promotion took place in the State of Illinois other than those aspects concerned with seeking responses to the promotion from persons located in Illinois.

ROBERT J. EVANS
Robert J. Evans

SUBSCRIBED AND SWORN to
before me this 19th day
of July, 1979.

ELIZABETH A. WILSON
Notary Public

My Commission Expires: 12/13/79

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT—CHANCERY DIVISION

[Caption omitted in printing]

SUPPLEMENTAL AFFIDAVIT OF ROBERT J. EVANS

Robert J. Evans, being duly sworn, deposes and says:

1. I am employed by The Gillette Company in its Advertising Services Division as the Manager, Promotion Services. I have held this position for over a year. I was Associate Manager, Promotion Services, for three years prior thereto. As part of my duties, I am responsible for supervising Gillette promotions and for monitoring consumer requests for redemption of Gillette promotions, and I have performed these tasks with respect to the Accent Table Lighter Promotion. The matters stated herein are within my own personal knowledge.

2. I have caused to be prepared a breakdown, by state, of the addresses of persons who responded to Gillette's Accent Table Lighter Promotion but whose requests could not be filled because of the depletion of stock, as of August 17, 1979. Such breakdown is attached hereto as Exhibit A. Because of the manner in which records were kept, the total on Exhibit A is overstated by approximately 7,000. This list therefore represents the maximum number of persons in each state whose request could not be filled.

3. The figures stated on Exhibit A are, to the best of my knowledge and belief, accurate and complete as of August 17, 1979.

ROBERT J. EVANS
Robert J. Evans

SUBSCRIBED AND SWORN TO
before me this 5th day
of September, 1979.

ELIZABETH A. WILSON
Notary Public

My Commission Expires: 12/13/79

EXHIBIT "A"

50 STATE CRICKET LIGHTER COUNT

Alabama	1,846	Montana	583
Alaska	379	Nebraska	1,988
Arizona	1,872	Nevada	1,164
Arkansas	1,996	New Hampshire	646
California	16,234	New Jersey	4,445
Colorado	1,530	New Mexico	719
Connecticut	1,701	New York	10,348
Delaware	689	North Carolina	3,684
District of Columbia	314	North Dakota	387
Florida	10,784	Ohio	10,729
Georgia	3,116	Oklahoma	2,926
Hawaii	549	Oregon	2,654
Idaho	569	Pennsylvania	11,634
Illinois	11,456	Puerto Rico	7
Indiana	5,494	Rhode Island	675
Iowa	2,976	South Carolina	1,835
Kansas	1,860	South Dakota	467
Kentucky	3,551	Tennessee	3,164
Louisiana	2,701	Texas	11,301
Maine	375	Utah	585
Maryland	3,923	Vermont	279
Massachusetts	3,769	Virginia	3,658
Michigan	6,489	Washington	5,995
Minnesota	2,071	West Virginia	1,508
Mississippi	881	Wisconsin	6,591
Missouri	4,090	Wyoming	292
		All Other	— 100
		Canada	— 1

GRAND TOTAL=179,580

REFERENCE TO PARTS OF THE RECORD REPRODUCED IN THE PETITION FOR CERTIORARI

The Order of the Circuit Court of Cook County, September 17, 1979, is set forth commencing at page A29 of the Petition For Certiorari herein.

The Opinion and Judgment of the Illinois Appellate Court, First District, October 3, 1980, is set forth commencing at page A20 of the Petition For Certiorari herein.

The Opinion and Judgment of the Illinois Supreme Court, November 13, 1981, is set forth commencing at page A1 of the Petition For Certiorari herein.

Opposition

Office - Supreme Court, U.S.
FILED
MAR 12 1982
ALEXANDER L. ST
CLERK

No. 81-1493

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

THE GILLETTE COMPANY,

Petitioner,

vs.

STEVEN MINER,

Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court Of The State Of Illinois

RESPONDENT'S BRIEF IN OPPOSITION

ROBERT S. ATKINS*
KENNETH P. ROSS
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Date: March 11, 1982

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTION PRESENTED

Whether a State Court decision refusing to dismiss a complaint brought on behalf of a plaintiff class which includes nonresidents of the forum state presents any constitutional questions which are reviewable by this Court at this early stage of the proceedings?

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Illinois Supreme Court Rule 308, Ch. 110A, §308, Ill. Rev. Stat. 4

No. 81-1493

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

THE GILLETTE COMPANY,

Petitioner,

vs.

STEVEN MINER,

Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court Of The State Of Illinois

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Steven Miner respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the decision of the Supreme Court of the State of Illinois in this case.

COUNTERSTATEMENT OF FACTS

Respondent Steven Miner brought this class action in the Circuit Court of Cook County, Illinois on behalf of a class of approximately 180,000 consumers residing throughout the United States, who were allegedly deceived by petitioner The Gillette Company ("Gillette")

in connection with the operation of a nationwide campaign to promote sales of its "Cricket" disposable butane lighters. Plaintiff alleges that Gillette fraudulently induced members of the plaintiff class to purchase thousands of Cricket lighters, well knowing its promotion offer of a "free" Accent table lighter with the purchase of two Cricket lighters was deceptive, and that Gillette knew and concealed the fact that "it did not have an adequate supply of Accent table lighters available to fill orders."

Having accepted Gillette's offer of a "free" Accent table lighter (which the promotion package acknowledged had a "$7.95 Retail Value"), and having submitted proofs of purchase of two Cricket lighters and payment of 50¢, Mr. Miner and each of the approximately 180,000 members of the plaintiff class seek compensatory and punitive damages resulting from Gillette's refusal to supply them with their "free" Accent table lighters.

In Count I of his Amended Complaint, plaintiff alleges that Gillette's conduct amounts to an "unfair and deceptive act or practice" prohibited by the Consumer Fraud and Deceptive Business Practices Act, Ill.Rev. Stat. (1979) Ch. 121½, §§261, *et seq.*, which consisted of unfairly, deceptively and fraudulently advertising and promoting sales of Cricket lighters tied to an unconditional offer of a "free" Accent table lighter, while concealing the fact that defendant could not fill the orders received. In Count II, plaintiff alleges that, having accepted Gillette's unconditional promotional offer, Gillette's refusal to comply with the terms of its offer and supply members of the plaintiff class with their "free" Accent lighters constituted a breach of contract.

The class of injured persons in this case is not limited to residents of Illinois. In its answer to an interrogatory

propounded by plaintiff, Gillette stated that of the 179,580 orders for "free" Accent lighters not filled, 11,456 were from residents of the State of Illinois. Gillette is licensed to do and does substantial business in the State of Illinois.

On July 10, 1979 defendant filed a Motion to Dismiss the Amended Complaint insofar as it was brought as a class action. The trial court, finding the requisites of Section 57.2a of the Illinois Civil Practice Act, Ill.Rev. Stat. (1979) Ch. 110, §57.2a, satisfied by the allegations in plaintiff's Amended Complaint, ruled that plaintiff's action could be maintained as a class action and denied defendant's motion.

Defendant moved in the alternative to dismiss the Amended Complaint:

> insofar as it is brought in a representative capacity on behalf of persons who are not residents of the State of Illinois because this Court has no jurisdiction to adjudicate the claims of such persons, the claims of such persons do not share common questions with the claim of Plaintiff, and Plaintiff cannot fairly and adequately protest (sic) the interests of such persons.

The trial court granted defendant's alternate motion to dismiss the multistate class "on the authority of *Spirek v. State Farm Mutual Automobile Ins. Co.*, 65 Ill. App. 3d 440 (1978)"[1] and certified the issue of the multi-

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[1] *Spirek v. State Farm Mutual Automobile Ins. Co.*, 65 Ill. App. 3d 440, 382 N.E. 2d 111 (1st Dist. 1978), which was binding on the trial court, is discussed at length in the opinion of the two lower courts. Because defendant Gillette raised the question of the multistate class by way of a motion to dismiss, the trial court was limited in its factual considerations to the allegations in the Amended Complaint. See *Steinberg v. Chicago Medical School*, 69 Ill. 2d 320, 329, 371 N.E. 2d 634 (1977).

state class for interlocutory appeal by permission pursuant to Illinois Supreme Court Rule 308, Ill.Rev.Stat. (1979) Ch. 110A, §308. On October 3, 1980 the Illinois Appellate Court for the First District affirmed the Order of the Circuit Court. 89 Ill. App. 3d 315, 411 N.E. 2d 1092.

The Illinois Supreme Court reversed the decision of the Appellate Court and the Circuit Court's order dismissing the nonresident members of the putative class, and remanded the case to the Circuit Court for further proceedings. The Illinois Supreme Court rejected defendant's position that minimum contacts are required of nonresident plaintiff class members, noting that the constitutionality of the action on behalf of nonresident members depends on whether the "plaintiff adequately represents the nonresident parties and [whether] notice can insure the class of its constitutional opportunity to be heard and protect each member's option to choose not to participate." (A-5).[2] The Court noted further that such questions "are matters for the trial court's further determination." (A-6).

Plaintiff to date has not moved for certification of the plaintiff class. Moreover, no motion is pending nor any judgment entered nor any settlement proposed with regard to the merits of plaintiff's substantive claims. There is no record of any other action pending in any other court against defendant arising out of its Accent table lighter promotion, either on an individual basis or as a class action.

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[2] The text of the opinions of the Illinois Supreme Court and the Illinois Appellate Court and the order of the Circuit Court of Cook County, Illinois, are set forth in the Appendix to defendant's Petition for a Writ of Certiorari, Etc., and need not be reproduced here.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

BECAUSE THE ISSUES RAISED BY PETITIONER ARE INTERLOCUTORY AND THE GROUNDS FOR REVIEW ARE SPECULATIVE, PETITIONER SEEKS AN ADVISORY OPINION FROM THIS COURT.

Defendant is asking this Court to review issues that are not presented in this case. Defendant speculates that a judgment entered in this case in Illinois would "*appear* to be unenforceable in Pennsylvania and New Jersey" (Petition for a Writ of Certiorari, Etc. at 6, emphasis added); that there is a "*likelihood* of conflicting nationwide class actions in different state courts involving the same claims" (*Id.* at 7, emphasis added); that a final adjudication "*may* be attacked by nonresident parties *if* it is unfavorable to them" (*Id.* at 8, emphasis added); and that the issues defendant raises are "*likely* to arise frequently in other cases" (*Id.* at 5, emphasis added). Given the present posture of this case, in which no judgment has been entered and certainly no judgment has been collaterally attacked,[3] and the fact that no

[3] The cases cited by defendant in support of its proposition that the questions raised in its petition are reviewable at this premature stage in the proceedings are inapplicable. (See Petition for Writ of Certiorari, Etc. fn. at 8). Both *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), and *Kulko v. California Superior Court*, 436 U.S. 84 (1978), involved state court jurisdiction over *defendants*. Likewise, *Hanson v. Denckla*, 357 U.S. 235 (1958), involved litigation over the validity of a trust and, accordingly, state court jurisdiction over nonresident trustees who were indispensible party defendants under Florida law. In each of those cases early review by this Court saved the defendants the time and

(Footnote continued on following page)

other action, much less a conflicting nationwide class action, has been brought in any other court involving the same claims here, a review of the issues raised by defendant would result in an advisory opinion at best.

Defendant's "uncertainty" as to whether a judgment entered in this case in Illinois would be given full faith and credit in the courts of sister states is difficult to comprehend considering the established line of decisions by this Court affording full faith and credit to judgments entered by a forum court in multistate class actions. In *Hartford Life Insurance Co. v. Ibs*, 237 U.S. 662, 671-74 (1915), a multistate class action of 12,000 policyholders was brought in a Connecticut state court and resulted in a favorable judgment for the class. An unnamed member of the class from Minnesota challenged the judgment in a court of her own state asserting that the Connecticut court had no jurisdiction over and could not bind nonresident members of the plaintiff class. This Court rejected her argument, holding that the courts of sister states must give full faith and credit to the Connecticut judgment. *Accord, Sovereign Camp of the Woodmen of the World v. Bolin*, 305 U.S. 66 (1938); *Hartford Life Insurance Co. v. Barber*, 245 U.S. 146 (1917); *Supreme Council of the Royal Arcanum v. Green*, 237 U.S. 531 (1915). Similarly, in *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921), this Court allowed a class action brought in federal court on behalf of persons who "resided in many

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[3] *continued*
expense of litigating the merits of an action in a forum which had no jurisdiction over them. In the present case, however, there is no question of the long-arm jurisdiction of the State of Illinois over defendant. Thus, defendant's interest in defending the merits of this action would in no way be affected by limiting the putative plaintiff class to Illinois residents.

different States of the Union," and held that the judgment rendered therein was binding on all members. 255 U.S. at 364. This Court noted: "That a class suit of this nature might have been maintained in a state court, and would have been binding on all of the class, *we can have no doubt.*" 255 U.S. at 366 (emphasis added).[4]

In summary, no issue of enforcement of judgment, full faith and credit nor the purported "usurping [of] the authority of other jurisdictions" is properly before this Court until a final judgment is entered by an Illinois court and sought to be enforced in the court of a sister state. The court below did nothing more than rule on an interlocutory matter involving Illinois class action practice and procedure. Requesting this Court to review the decision below in the present posture of these proceedings is not only asking this Court to rule on class action issues in the piecemeal manner rejected in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), but is requesting this Court to issue an advisory opinion on matters which have neither occurred nor are likely to occur in this litigation.

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[4] Even if one were to agree with the implication of defendant's position that *Hartford Life Insurance Co. v. Ibs*, 237 U.S. 662 (1915), and its progeny should be reexamined, this case is hardly the proper vehicle to do so. In each of the *Hartford* line of cases the full faith and credit issue was raised by the real party in interest, *i.e.*, a class member seeking to enforce or attack a judgment in the court of a sister state. Here, however, defendant's concern with the due process rights of plaintiff class members is somewhat in conflict with its pecuniary interest of resolving approximately 180,000 claims in one proceeding. Thus, not only are the issues raised in defendant's Petition premature, but, if they had any merit, they would be better raised by the party who has a real interest in the outcome.

II.

THE ISSUES RAISED BY DEFENDANT'S PETITION HAVE BEEN PREVIOUSLY DECIDED BY THIS COURT AND DO NOT MERIT REVIEW.

Defendant's contention that the "issue decided by the Illinois Supreme Court has never been decided by this Court" is erroneous. In *Hartford Life Insurance Co. v. Ibs*, 237 U.S. 662 (1915), this Court had long ago approved state class actions which include nonresidents of the forum state in the plaintiff class. (See Text, *supra* at 7-8). In *Hansberry v. Lee*, 311 U.S. 32, 40-42 (1940), this Court reaffirmed its determination that procedural due process, not strict notions of territoriality, must be satisfied to bind nonresident plaintiff class members to a judgment entered in a state class action:

> It is a principal of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. (Citations omitted). A judgment rendered in such circumstances is not entitled to the full faith and credit which the Constitution and statutes of the United States, (citations omitted) prescribe . . .
>
> To these general rules there is a recognized exception that, to an extent not precisely defined by judicial opinion, the judgment in a 'class' or 'representative' suit, to which some members of the class are parties, may bind members of the class or those represented who were not made parties to it . . .
>
> . . . Courts are not infrequently called upon to proceed with causes in which the number of those interested in the litigation is so great as to make difficult or impossible the joinder of all because some are not within the jurisdiction or because their whereabouts are unknown or where if all were made parties to the suit its continued abatement by the death of some would prevent or unduly delay a

> decree. In such cases where the interests of those not joined are of the same class as the interests of those who are, and where it is considered that the latter fairly represent the former in the prosecution of the litigation of the issues in which all have a common interest, the court will proceed to a decree. . . . 311 U.S. at 40-42 (emphasis added).

Finally, in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 311-312 (1950), in which a representative suit was brought in New York to settle the account of a corporate fiduciary, this Court addressed the following problem:

> We are met at the outset with a challenge to the power of the State—the right of its courts to adjudicate at all as against those beneficiaries who reside without the State of New York. It is contended that the proceeding is one *in personam* in that the decree affects neither title to nor possession of any res, but adjudges only personal rights of the beneficiaries to surcharge their trustee for negligence or breach of trust. Accordingly, it is said, under the strict doctrine of *Pennoyer v. Neff*, 95 U.S. 714, 24 L. Ed. 565, the Surrogate *is without jurisdiction as to non-residents* upon whom personal service of process was not made. (Emphasis supplied).

This Court held that the New York court had the power to adjudicate the rights of nonresident beneficiaries over whom the New York court lacked *in personam* jurisdiction without violating their due process rights.

Defendant Gillette posits certain hypothetical problems which it assures this Court will arise in the wake of the lower court's decision. However, since *Hartford Life* and *Hansberry*, there have been *no* reported decisions in which a state denied full faith and credit to a judgment entered in a multistate class action and *no* reported decisions in which problems arose out of "conflicting nationwide class actions" involving the same claim.

Thus, in light of the policy favoring binding adjudication of numerous identical small claims in a single proceeding and affording the small claimant his day in court, this Court has suggested that class actions of the nature of the case at bar ". . . can often be most appropriately tried in state courts." *Snyder v. Harris*, 394 U.S. 332, 341 (1969).[5]

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[5] Defendant places unfounded reliance on *Shaffer v. Heitner*, 433 U.S. 186 (1977), and *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), for the proposition that "minimum contacts" are required of nonresident members of a plaintiff class. Neither of those cases, both of which concerned jurisdiction over nonresident defendants, in any way diminishes the "recognized exception" to the requirement of *in personam* jurisdiction discussed in *Hansberry v. Lee*, 311 U.S. 32, 40-42 (1940). Indeed, in *World-Wide Volkswagen* this Court wrote:

> The Due Process Clause of the Fourteenth Amendment limits the power of a state court to render a valid personal judgment against a nonresident *defendant*. . . . Due process requires that the *defendant* be given adequate notice of the suit, . . . and be subject to the personal jurisdiction of the court, . . .
>
> As has long been settled, and as we reaffirm today, a state court may exercise personal jurisdiction over a nonresident *defendant* only so long as there exist 'minimum contacts' between the *defendant* and the forum State. . . .' 444 U.S. at 291. (emphasis added, citations omitted).

In *Rush v. Savchuk*, 444 U.S. 320 (1980), this Court explained exactly what it meant by the phrase from *Shaffer v. Heitner, supra*, which defendant quotes in its Petition:

> In *Shaffer v. Heitner* we held that 'all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny.' 433 U.S. at 212. *That is, a State may exercise jurisdiction over an absent defendant only if the defendant has 'certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'* 444 U.S. at 327 (emphasis added).

In this regard it should be noted that even the dissent to the lower court's opinion recognized "that a departure from the 'minimum contacts' requirement is permissible" in this case. (A-13).

CONCLUSION

For all of the foregoing reasons, Respondent Steven Miner prays that the writ of certiorari be denied.

Respectfully submitted,

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Date: March 11, 1982

Petitioner's Reply Brief

Office - Supreme Court, U.S.
FILED
MAR 19 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1493

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

THE GILLETTE COMPANY,

Petitioner,

v.

STEVEN MINER,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Illinois

PETITIONER'S REPLY BRIEF

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World-Wide Volkswagen Corp. v. *Woodson*, 444 U.S. 286 (1980) 2

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On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Illinois

PETITIONER'S REPLY BRIEF

Petitioner The Gillette Company ("Gillette")* replies to Respondent's Brief In Opposition ("Resp. Brf.") as follows:

The decision sought by petitioner is not "advisory". It will determine whether some 168,000 nonresident claims may be litigated in this case without the claimants' consent. Respondent argues that the petition should be denied because certain *other* situations in which the question presented may arise, which were cited by Gillette to show the importance of the question, are not now before the Court (Resp. Brf., pp. 5-6). The fact that a decision may also have an impact in other situations does not make it "advisory".

* Petitioner's statement pursuant to Supreme Court Rule 28.1 is set forth at page A33 of the Petition filed February 9, 1982.

Respondent argues that "the court below did nothing more than rule on an interlocutory matter involving Illinois class action practice and procedure" (Resp. Brf., p. 7), but this is not true. The court below fully and finally decided the federal constitutional issue presented to it (Petition, pp. A3-A7). The only matters of substance left for resolution are state law issues.*

Respondent further argues that the question presented is not properly reviewable "at this premature stage in the proceedings" (Resp. Brf., p. 5, n. 3). Respondent attempts to distinguish cases such as *World-Wide Volkswagen* v. *Woodson*, 444 U.S. 286 (1980), in which this Court reviewed similarly final decisions as to state court jurisdiction made at a similar stage in the proceedings, on the ground that in this case a decision on jurisdiction at this time would not save petitioner "the time and expense of litigating the merits" (Resp. Brf., pp. 5-6, n. 3). Respondent ignores the fact that a decision on jurisdiction here will determine whether petitioner must litigate in this case the merits of some 168,000 claims arising under the laws of all states other than Illinois.

Respondent's attempts to distinguish cases relied upon by petitioner merely because they deal with jurisdiction over defendants instead of plaintiffs (Resp. Brf., p. 5, n. 3; p. 10, n. 5) are without merit for reasons discussed in Gillette's Petition (pp. 9-10). Respondent suggests no reason why a different jurisdictional standard should apply

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* Respondent also errs in implying that the constitutional question was decided only on the pleadings (Resp. Brf., p. 3, n. 1). Gillette's motion was supported by affidavits establishing the absence of "minimum contacts" which were received and considered by the courts below without objection. In any event, the absence of contacts between nonresident class members and the State of Illinois is undisputed.

to nonresident plaintiffs who do not affirmatively consent to a state court's jurisdiction than to nonresident defendants who do not so consent.

Respondent argues that petitioner does not have a sufficient "real interest in the outcome" to obtain a review of the constitutional question here (Resp. Brf., p. 7, n. 4). This Court has, however, held that any defendant affected by a state court's judgment has that "direct and substantial personal interest in the outcome" necessary to challenge the court's acquisition of jurisdiction over an indispensable party. *Hanson* v. *Denckla*, 357 U.S. 235, 244-245 (1958).* Nonresident class members are obviously indispensable parties to an adjudication of their personal claims against petitioner. It would, moreover, be manifestly unfair to deny petitioner the right to challenge the court's jurisdiction on federal constitutional grounds when the nonresident claimants, not having consented to such jurisdiction, do not give up any such right.

Finally, respondent contends (Resp. Brf., pp. 6-7, 8-9) that a number of prior decisions of this Court support the decision below, citing *Hartford Life Insurance Co.* v. *Ibs*, 237 U.S. 662 (1915); *Sovereign Camp of the Woodmen of the World* v. *Bolin*, 305 U.S. 66 (1938); *Hartford Life Insurance Co.* v. *Barber*, 245 U.S. 146 (1917); *Supreme Council of the Royal Arcanum* v. *Green*, 237 U.S. 531 (1915); *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U.S. 356 (1921); *Hansberry* v. *Lee*, 311 U.S. 32 (1940); and *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). Respondent

* Respondent erroneously describes *Hanson* v. *Denckla* as a case in which the forum "had no jurisdiction over" the defendants (Resp. Brf., p. 6, n. 3). The defendant-appellants in *Hanson* were themselves subject to the jurisdiction of the Florida court whose judgment they successfully attacked.

ignores the fact that in *all* of those cases there were sufficient contacts between nonresident class members and the forum state to support jurisdiction. See especially the discussion in *Hartford Life Insurance Co.* v. *Ibs*, 237 U.S. 662 at 671 (1915) and *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 at 313 (1950). No decision of this Court has ever upheld state court jurisdiction in a case where, as here, there are no contacts whatever between nonresidents and the forum state.

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MOTION FILED
MAR 15 1982

No. 81-1493

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

THE GILLETTE COMPANY,
Petitioner,
vs.
STEVEN MINER,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICI CURIAE THE NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, THE ALLIANCE OF AMERICAN INSURERS, AND THE AMERICAN INSURANCE ASSOCIATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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IN THE

Supreme Court of the United States

OCTOBER TERM 1981

No. 81-1493

THE GILLETTE COMPANY,

Petitioner,

vs.

STEVEN MINER,

Respondent.

MOTION OF AMICI CURIAE THE NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, THE ALLIANCE OF AMERICAN INSURERS AND THE AMERICAN INSURANCE ASSOCIATION FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

The National Association of Independent Insurers, the Alliance of American Insurers and the American Insurance Association move pursuant to Supreme Court Rule 36.1 for leave to file the accompanying brief in support of the petition for a writ of certiorari filed herein by petitioner The Gillette Company.

Amici are trade associations composed of most of the insurance companies writing policies of property and casualty insurance throughout the United States. By permitting maintenance of nationwide class actions in the courts of Illinois despite the absent class members' conceded lack of minimum contacts with Illinois, the decision below poses a substantial threat to the interests of *amici*. Because they serve millions of consumers located in every state, members of the associations are especially likely to become involved in such nationwide class actions. Those class actions would present unique problems to the insurance industry, since insurers are subject to varying forms of extensive regulation by each of the fifty states.

Accordingly, *amici* believe that they will present arguments to this Court that will not be presented in the same form by the parties.

Amici have sought the consent of counsel for petitioners, H. Blair White, and counsel for respondent, Robert Atkins, for leave to file the accompanying brief. Counsel for respondent denied this request.

For the foregoing reasons, *amici* the National Association of Independent Insurers, the Alliance of American Insurers, and the American Insurance Association pray that this Court grant their motion for leave to file the accompanying brief in support of the petition for a writ of certiorari to the Supreme Court of Illinois in the case of *The Gillette Company* vs. *Miner*.

Respectfully submitted,

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Dated: March 11, 1982

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INTEREST OF AMICI CURIAE

Amici, the National Association of Independent Insurers ("NAII"), the Alliance of American Insurers ("AAI"), and the American Insurance Association ("AIA"), are trade associations composed of most of the major insurance companies writing policies of property and casualty insurance in the United States. Together, they have more than 750 members which collectively write approximately 60% of the property and casualty insurance in force nationwide.

The interest of the associations as *amici* arises out of the impact which the decision below may have on (1) class action litigation in which members of the associations become involved and on (2) the orderly regulation of the business of insurance in the United States.

In the McCarran-Ferguson Insurance Regulation Act of 1945, Congress declared that "the continued regulation and taxation by the several States of the business of insurance is in the public interest...." 15 U.S.C. § 1011 (1976). In response to that Act, and in order to preserve their primacy in the field of insurance regulation, the states have adopted separate statutes and administrative regulations pertaining to such matters as property and casualty insurance rates, cancellation and non-renewal of automobile and homeowners insurance policies, insurance holding companies and unfair and deceptive trade practices.[1] As a result, this Court has recognized that "[w]hen the States speak in the field of

[1] A catalog of the rate regulation, deceptive trade practices, and holding company statutes of the fifty states is contained in a publication of the Illinois Department of Insurance, *Insurance Regulation and Antitrust: The Effect of the Repeal of the McCarran-Ferguson Act* 24 nn. 22, 24, 26 (1979). The statutes governing the cancellation and nonrenewal of automobile insurance are described in the American Insurance Association's *Summary of Selected State Laws and Regulations Relating to Automobile Insurance* 20-40 (1979).

'insurance,' they speak with the authority of a long tradition." *S.E.C.* v. *Variable Annuity Life Insurance Co.*, 359 U.S. 65, 68-69 (1959).

The insurance practices which are separately regulated by the state insurance codes and administrative regulations have in recent years been the subjects of numerous consumer class actions in state courts.[2] When a class is limited to policyholders who are residents of one state, the insurance laws and regulations of the forum are applied to resident policyholders who are plainly subject to the court's *in personam* jurisdiction. In a nationwide class action, however, the rights of California policyholders, under statutes and regulations administered by the California Department of Insurance, might be determined by an Illinois court which lacks *in personam* jurisdiction over both the California policyholders and Department.

The prospect of having the courts of one state intrude on the independent regulation of the insurance business in the other forty-nine states, in matters involving thousands or millions of policyholders having no contacts with the forum, threatens to disrupt the Congressionally recognized right of each state to regulate that business within its jurisdiction as it sees fit. Accordingly, *amici* submit that the decision below is one of substantial significance warranting this Court's review.

SUMMARY OF ARGUMENT

A state court may not exercise jurisdiction over absent class plaintiffs who lack minimum contacts with the forum. The "minimum contacts" test of personal jurisdiction developed by this Court must be applied to all parties who have

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[2] *See, e.g., Steward* v. *Allstate Ins. Co., 92 Ill. App. 3d 637, 415 N.E.2d 1206 (1st Dist. 1980) (cancellation and non-renewal); Spirek* v. *State Farm Mutual Automobile Ins. Co.*, 65 Ill. App. 3d 440, 382 N.E.2d 111 (1st Dist. 1978) (subrogation rights under automobile insurance policies).

not consented by affirmative act to a state court's jurisdiction. This rule of law is required by principles of federalism based on the territorial limits of each state's sovereign power. These principles are of particular practical importance to the interests of *amici* because of the extensive regulation of insurance by the individual states. The decision below, if applied to insurance cases, will result in extensive interference with the present system of insurance regulation. If an Illinois court purports to enter a final judgment binding absent class members beyond the court's jurisdiction, that judgment may not be accorded full faith and credit by other states.

REASONS FOR GRANTING THE WRIT

BY PERMITTING ILLINOIS COURTS TO EXERCISE JURISDICTION OVER ABSENT CLASS MEMBERS WHO LACK MINIMUM CONTACTS WITH ILLINOIS, THE DECISION BELOW CONTRAVENES THIS COURT'S RECENT DECISIONS ON *IN PERSONAM* JURISDICTION AND DISREGARDS FUNDAMENTAL CONSTITUTIONAL LIMITATIONS ON THE POWERS OF THE STATES.

THE DECISION OF THE SUPREME COURT OF ILLINOIS THUS THREATENS TO DISRUPT THE REGULATION OF THE BUSINESS OF INSURANCE BY SUBJECTING AMICI'S MEMBERS TO NATIONWIDE CLASS ACTION LITIGATION IN THE COURTS OF ONE STATE ON ISSUES PROPERLY DETERMINED BY THE SEPARATE STATE INSURANCE DEPARTMENTS AND COURTS.[3]

It is axiomatic that a state court may not exercise jurisdiction in any case in which the parties and the subject matter of the litigation lack "minimum contacts" with the forum.

[3] In addition to the grounds cited herein, *amici* adopt the reasons for granting the writ advanced by The Gillette Company in its Petition for a Writ of Certiorari.

See, e.g., Shaffer v. Heitner, 433 U.S. 186, 212 (1977). The "minimum contacts" test "acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 292 (1980). The ruling below that the "minimum contacts" test does not apply at all to absent class plaintiffs, Petitioner's Appendix at A-3 - A-7, plainly violates this Court's decisions which hold that state court jurisdiction is constrained by basic constitutional principles of federalism. For the reasons discussed *supra*, such constraints apply with particular force in cases involving insurance regulation to which *amici's* members are frequently parties.

A. Principles of Federalism Inherent in the Concept of Due Process Limit State Court Jurisdiction.

Contrary to the assertions of the court below, the "minimum contacts" test is imposed as a limit on state court jurisdiction not only to protect interests of individual litigants, but also to promote the distinct and significant purpose of maintaining the constitutionally mandated balance of power among the states in our federal system. Accordingly, it is settled that the "minimum contacts" test is not satisfied merely by showing that a forum is convenient to the parties:

> Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States.

Hanson v. Denckla, 357 U.S. 235, 251 (1958). This Court recently reiterated this principle:

> Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an

> instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.

World-Wide Volkswagen Corp. v. *Woodson*, 444 U.S. 286, 294 (1980).

Even when it is not unfair to a litigant to require his appearance in a particular forum, absence of "minimum contacts" precludes the exercise of jurisdiction. Thus, this Court held in *Rush* v. *Savchuk*, 444 U.S. 320 (1980), that state court jurisdiction over an insured defendant may not be based solely upon the presence within the state of an insurance company that has undertaken a contractual obligation to defend and indemnify him in connection with the suit. *Id.* at 328-33. In doing so, the Court reversed the holding of the Minnesota Supreme Court that in these circumstances jurisdiction could be asserted whether or not the named defendant had "minimum contacts" with the jurisdiction because the burden of the case fell on the insurer:

> The State's ability to exert its power over the "nominal defendant" is analytically prerequisite to the insurer's entry into the case as a garnishee. If the Constitution forbids the assertion of jurisdiction over the insured based on the policy, then there is no conceptual basis for bringing the "garnishee" into the action. Because the party with forum contacts can only be reached through the out-of-state party, the question of jurisdiction over the nonresident cannot be ignored.

Id. at 330-31 (footnote omitted).

The Court expressly found it unnecessary to refer to "traditional notions of fair play and substantial justice" in a case in which "the defendant has *no* contacts with the forum." *Id.* at 332. Where, as in *Rush*, there are *no* contacts, assertion of jurisdiction is constitutionally barred by the Due Process Clause "acting as an instrument of interstate federalism." *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 294 (1980).

The Illinois Supreme Court did not even consider these principles of federalism—principles which this Court has consistently held to be essential to constitutional analysis. Instead, the Illinois court, like the court overruled in *Rush* v. *Savchuk*, looked only to the "fairness" of requiring a particular individual to appear in the courts of a given jurisdiction. It assumed that this was all that was constitutionally required merely because it was absent plaintiffs, rather than absent defendants, who lacked minimum contacts with the forum. To the contrary, however, the "consequence of territorial limitations on the power of the respective States," *Hanson* v. *Denckla*, 357 U.S. at 251, cannot be affected by the alignment of parties as plaintiffs or defendants.[4] The decision below is thus inconsistent with this Court's prior decisions which dictate that, in deference to principles of federalism, jurisdiction should not be exercised absent sufficient minimum contacts of the parties or subject matter of the litigation with the forum state.

B. Other States, Insurers and Consumers Have a Strong Interest in the Consistent Application of State Statutes and Regulations Governing Insurance by State Authorities Without Interference by Sister States.

Since the passage of the McCarran-Ferguson Insurance Regulation Act of 1945, 15 U.S.C. §§ 1011-1015 (1976), it has been acknowledged that the public policy of the United States has been to leave insurance regulation to the states. *See Prudential Insurance Co.* v. *Benjamin*, 328 U.S. 408, 429-30 (1945). Recognizing the special interest of the states in issues of insurance regulation, federal courts often decline to exercise their jurisdiction in such cases to avoid interference with the orderly application of state law. *E.g., Levy* v.

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[4] *See Vanderbilt* v. *Vanderbilt*, 354 U.S. 416, 418-19 (1957) (alimony rights of absentee respondent in divorce proceeding); *New York Life Ins. Co.* v. *Dunlevy*, 241 U.S. 518 (1916) (right of adverse claimant in interpleader action). *See generally* Note, *Multistate Plaintiff Class Actions*, 92 Harv. L. Rev. 718, 726 & nn. 70-73 (1979).

Lewis, 635 F.2d 960, 963-64 (2nd Cir. 1980); *Smith* v. *Metropolitan Property & Liability Insurance Co.*, 629 F.2d 757, 760-61 (2d Cir. 1980); *Allstate Insurance Company* v. *Sabbagh* 603 F.2d 228, 233-34 (1st Cir. 1979). Allowing Illinois courts to exercise their jurisdiction in nationwide class actions involving the insurance laws of other states would be totally inconsistent with this Congressionally mandated and judicially enforced scheme of state insurance regulation. Allowing Illinois courts to exercise jurisdiction in such cases would also be unfairly detrimental to defendants' and absent class members' interests in the orderly application of the law and would violate the sovereignty of sister states.

"[T]he Due Process Clause ensures not only fairness, but also the 'orderly administration of the laws'...." *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 280, 294 (1980) (quoting *International Shoe Co.* v. *Washington*, 326 U.S. 310, 319 (1945)). The court below ignored the many problems caused by administering the laws of all fifty states in one proceeding. The court viewed the problem as merely one of "manageability" under the Illinois class action statute. Petitioner's Appendix at A-8. However, the problem has a constitutional dimension as well. The mammoth complexity of managing a class action comprised of millions of plaintiffs divided into fifty subclasses requiring the application of fifty states' laws puts such a burden of time and expense on the court and defendant that due process and a right to a fair trial itself may be lost in the fray.[5]

[5]That problems of "manageability" could constitute a denial of defendant-insurer's right to a fair trial is apparent from considering a hypothetical nationwide class action alleging breach of an insurance contract. In such a case, a state court would be required to adjudicate every state's statute of limitation, common law regarding breaches of contract, waiver, estoppel, etc., as well as unfamiliar and complex statutes and regulations governing insurance contracts. Moreover, the procedural provisions of each state's insurance statutes and regulations would have to be interpreted in order for the court to rule on such defenses as primary jurisdiction and failure to exhaust administrative remedies. This process would be further complicated by the

Parties may always be at some disadvantage when a court attempts to apply unfamiliar foreign law. *See Allstate Insurance Company* v. *Hague*, 449 U.S. 302, 326 & n.14 (1981) (opinion of Stevens, J., concurring in judgment). The possibility of error and confusion is obviously magnified when a court attempts to apply the laws of all fifty states at once. *See, e.g., Spirek* v. *State Farm Mutual Automobile Insurance Co.*, 65 Ill. App. 3d 440, 453-54, 382 N.E.2d 111, 120-121 (1st Dist. 1978). Such an attempt, no matter how heroic, is inconsistent with the due process interest in the orderly application of laws recognized in *World-Wide Volkswagen*.

"'[T]he Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.'" *National League of Cities* v. *Usery*, 426 U.S. 833, 844 (1976) (quoting *Texas* v. *White*, 7 Wall. 700, 725 (1869)). One state should not be permitted to violate the sovereignty of the other states by adjudicating a controversy concerning the citizens of the other states under the laws of the other states when the forum state itself has little or no interest in the litigation. In the present case, there is no reason to try claims by unnamed out-of-state plaintiffs in Illinois except that Illinois attorneys happened to file an action in Illinois before any were filed elsewhere. Indeed, the Illinois Supreme Court did not even purport to identify any Illinois interest that would be furthered by assuming jurisdiction. Surely, if there is any case in which the territorial limitation of state court jurisdiction recognized in *World-Wide Volkswagen Corp.* v. *Woodson* is violated, it is an action where a court purports to adjudicate totally foreign claims.

Interference with the administration of justice would be particularly acute in cases involving the business of insurance. The insurance statutes and regulations of the fifty states are both complicated and diverse. Not only has each state adopted its own statutes and promulgated its own

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changes in each state's insurance laws and regulations which might have taken place during the relevant period.

regulations, but each has developed its own common law. Moreover, in every state, the power to enforce the insurance laws is vested in an Insurance Department or similar body with expertise in that state's law. Thus, even when two states have adopted substantively similar statutes, the statutes may be interpreted and applied differently by the regulators and the courts of those two states.

Finally, at least two states have already ruled that nationwide class actions are improper on the ground that a state court could not exercise jurisdiction over claims of nonresidents lacking minimum contacts with the forum.[6] In such states, the validity of a judgment against a nationwide class obtained by insurers who successfully defend an Illinois action may be not accorded full faith and credit. Only a determination now by this Court as to the propriety of nationwide class actions in a state court can avoid the chaos which will be caused by the inconsistent judgments of various jurisdictions on this issue.

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[6] *Feldman v. Bates Mfg. Co.*, 143 N.J. Super. 84, 362 A.2d 1177 (App. Div. 1976); *Klemow v. Time, Inc.*, 466 Pa. 189, 352 A.2d 12, *cert. denied*, 429 U.S. 828 (1976).

CONCLUSION

For the reasons set forth herein, *amici* respectfully submit that the decision below is of substantial significance warranting this Court's review, and that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: March 11, 1982

Petitioner's Brief

Office - Supreme Court, U.S.
FILED
JUN 1 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1493

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

THE GILLETTE COMPANY,

Petitioner,

v.

STEVEN MINER,

Respondent.

On Writ of Certiorari To
The Supreme Court of The State of Illinois

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Do the Due Process Clause of the Fourteenth Amendment and basic principles of federalism prohibit a state court in a class action from exercising jurisdiction over class members (1) who are not residents of the forum State, (2) who have no contacts whatever with the forum State, and (3) who have not affirmatively consented to such jurisdiction, where the purpose of such exercise is to adjudicate class members' claims which arise entirely in other States and in which the forum State has no significant interest?

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No. 81-1493

IN THE

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THE GILLETTE COMPANY,

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STEVEN MINER,

Respondent.

On Writ of Certiorari To
The Supreme Court of The State of Illinois

BRIEF FOR THE PETITIONER*

OPINIONS BELOW

The opinion of the Supreme Court of the State of Illinois is reported at 87 Ill.2d 7, 428 N.E.2d 478, and is set forth commencing at page A1 of the Petition for Certiorari. The opinion of the Illinois Appellate Court is reported at 89 Ill.App.3d 315, 411 N.E.2d 1092, and is set forth commencing at page A20 of the Petition for Certiorari. The unpublished order of the Circuit Court of Cook County, Illinois is set forth at page A29 of the Petition for Certiorari.

* Petitioner's statement pursuant to Supreme Court Rule 28.1 is set forth at page A 33 of the Petition for Certiorari.

JURISDICTION

The judgment of the Supreme Court of Illinois was entered on November 13, 1981. A timely petition for writ of certiorari was filed on February 9, 1982, and granted on April 5, 1982. This Court's jurisdiction is based upon 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . ."

The statutory provisions involved are Sections 57.2 through 57.7 of the Illinois Civil Practice Act (Chapter 110, Pars. 57.2 through 57.7, Illinois Revised Statutes). These statutory provisions are set out at page A31 of the Petition for Certiorari.

STATEMENT OF THE CASE

Petitioner The Gillette Company ("Gillette") is a Delaware Corporation engaged in the business of manufacturing and distributing certain consumer products (J.A. 4, 22). In 1978 Gillette conducted a nationwide retail merchandising promotion whereby it proposed to give a free "Accent" table cigarette lighter, having a suggested retail price of $7.95, to persons submitting a 50-cent postage and handling fee and proofs of purchase of two "Cricket" disposable pocket cigarette lighters (J.A. 11, 22). Gillette filled over 240,000 requests for Accent lighters, a substantially greater number than it had expected based upon its experience with prior promotions, but because its supply was exhausted and because of the long time period necessary to manufacture

additional Accent lighters it was unable to fill approximately 180,000 additional requests and instead returned the 50-cent charge together with a complimentary Cricket lighter and letter of explanation (J.A. 17, 22-24).

Respondent Steven Miner is an Illinois resident who sought to participate in the Accent table lighter promotion. He purchased two Cricket lighters for $1.10 each (Miner Dep., p. 12) and submitted his proofs of purchase and postage and handling fee, but his money was returned together with a complimentary Cricket lighter and the letter of explanation. Respondent then brought this action against Gillette in the Circuit Court of Cook County, Illinois, on his own behalf and, under Section 57.2 of the Illinois Civil Practice Act (Ch. 110, Par. 57.2, Ill.Rev. Stat.), on behalf of a nationwide class consisting of all other persons who had requested an Accent lighter pursuant to the promotion but had not received one. The Amended Complaint alleges that Gillette's failure to supply Accent lighters constituted a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act (Ch. 121½, Par. 261, *et seq.*, Ill.Rev. Stat.) and a breach of contract. (J.A. 4-12)

Under Section 57.2 of the Illinois Civil Practice Act, a class action may be certified when "there are questions of fact or law common to the class, which common questions predominate over any questions affecting only individual members." Section 57.3 of that Act (Ch. 110, Par. 57.3, Ill.Rev.Stat.) provides that upon determining that an action is maintainable on behalf of a class the court shall "describe those whom the court finds to be members of the class." Pursuant to Section 57.6 (Ch. 110, Par. 57.6, Ill.Rev. Stat.), any judgment in the action is then binding on all members of the class as defined by the court except those who have affirmatively requested to be excluded in the proper manner as provided by Section 57.5(b) (Ch. 110, Par. 57.5(b), Ill.Rev.Stat.).

Gillette moved, *inter alia*, to dismiss the Amended Complaint insofar as it was brought on behalf of a class of persons who are not residents of the State of Illinois on the grounds that the Illinois courts have no jurisdiction to adjudicate the claims of such nonresidents and that the action did not meet the requirements for a class action under the Illinois Civil Practice Act. (J.A. 19-20) In support of this motion Gillette submitted undisputed evidence that (1) Gillette's corporate headquarters are located in Massachusetts, and the Accent promotion was planned and executed in Massachusetts; (2) the receipt and processing of consumer requests pursuant to the promotion was handled by Spotts International, St. Paul, Minnesota, and took place in Minnesota; (3) no aspects of the promotion took place in the State of Illinois other than those concerned with seeking responses to the promotion from persons located in Illinois; (4) requests for Accent lighters which were not filled came from persons with addresses in every one of the 50 states, the District of Columbia, Puerto Rico, and Canada; and (5) only 11,456 of the approximately 180,000 unfilled requests came from persons with addresses in Illinois. (J.A. 28-32)

The Circuit Court of Cook County on September 17, 1979, entered an order permitting the action to be maintained on behalf of residents of Illinois but granting Gillette's motion to dismiss the action insofar as it was brought on behalf of persons who were not residents of Illinois. (Cert. Pet. A29-A30)

Respondent perfected an interlocutory appeal to the Illinois Appellate Court for the First District. The Appellate Court affirmed the order of the Circuit Court on October 3, 1980, basing its ruling with respect to nonresident class members both upon its conclusion that "no common question of law predominates as to nonresidents" as required

by Section 57.2 of the Illinois Civil Practice Act and upon its conclusion that, because nonresidents had no contacts with Illinois, any decision as to their claims "would have no binding effect beyond the jurisdiction of the Illinois courts" (Cert. Pet. A25-A26).

Respondent then sought and obtained leave to appeal to the Illinois Supreme Court. That Court, with two judges dissenting, reversed the Circuit Court's order dismissing the nonresident claims, otherwise affirmed the Circuit Court, and remanded the case to the Circuit Court. The Illinois Supreme Court first acknowledged (Cert. Pet. A3) that there was no contention that the relationship of nonresident class members with Illinois met the "minimum contacts" test of *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), and its progeny, but held that the "minimum contacts" test did not apply to nonresident plaintiffs in a class action. In support of this holding it cited *Hansberry* v. *Lee*, 311 U.S. 32 (1940), and *Shutts* v. *Phillips Petroleum Co.*, 222 Kan. 527, 567 P.2d 1292 (1977), *cert. denied*, 434 U.S. 1068 (1978) (Cert. Pet. A3-A4). It also stated that such an exception to *International Shoe* was justified because a class action is predicated on the inability of a court to entertain the actual appearance of all members of a class and the impracticability of having each member prosecute his individual claim (Cert. Pet. A5).

The Illinois Supreme Court further held that the constitutionality of the exercise of jurisdiction over nonresident class members under the Due Process Clause of the Fourteenth Amendment was established in this action by the fact that nonresidents would be afforded adequate representation and adequate notice (Cert. Pet. A5). It found no evidence to indicate respondent was not an adequate representative (Cert. Pet. A5-A6). It also stated that in this case notice should be sent individually to class members

and must inform each class member of his right to "opt out" of the action and must specify the procedure to accomplish such (Cert. Pet. A6). The court concluded that with such notice a judgment would be binding on nonresident class members and entitled to full faith and credit under the United States Constitution (Cert. Pet. A7).

The court below recognized that adjudication of the claims of the class members here would require "application of the laws of the 50 States" (Cert. Pet. A8). It held, however, that it nevertheless was possible that the "common question" requirements of the Illinois Civil Practice Act could be satisfied (Cert. Pet. A9). It therefore permitted the Circuit Court on remand to entertain a nationwide class.

SUMMARY OF ARGUMENT

The decisions of this Court consistently have held that the Due Process Clause of the Fourteenth Amendment prohibits a state court from exercising jurisdiction over nonresidents who do not have "contacts, ties or relations" with the forum State or affirmatively consent to jurisdiction. *International Shoe Co.* v. *Washington,* 326 U.S. 310 (1945); *Pennoyer* v. *Neff,* 95 U.S. 714 (1877). These decisions are based on considerations of state sovereignty, as well as convenience and procedural fairness. *World-Wide Volkswagen Corp.* v. *Woodson,* 444 U.S. 286 (1980). This Court has never recognized a different test of jurisdiction applicable to nonresidents who are members of a plaintiff class, and there is no reason for doing so. Nonresident class members in this case do not have any contacts with the State of Illinois, yet under the decision below their rights may be adjudicated in this action without their affirmative consent to jurisdiction. The decision below is inconsistent with the decisions of this Court and must be reversed.

Furthermore, the decision below would permit one State to encroach upon the judicial power of other States and thereby interfere with the orderly administration of their laws in a manner inconsistent with the principles of federalism which are enforced by the Due Process Clause. The decision below totally disregards each State's sovereign power to try causes in its courts which is retained by the States under the Constitution. Under the assertion of jurisdiction authorized by the Illinois Supreme Court, state policies with respect to conduct within their borders would be ignored or incorrectly or inconsistently applied. Such an assertion of jurisdiction would also lead to conflicts of jurisdiction among the States. There is no justification for such interferences with State autonomy and the orderly administration of the laws when no interest of the forum State is served thereby. The efficiencies of class actions can be achieved even if their scope is limited to class members whose contacts with the forum State meet the jurisdiction standards of *International Shoe*. In any event, efficiency is not a sufficient ground under our federal system for one State to invade the sovereignty and interfere in the administration of the laws of another.

ARGUMENT

I. THE JURISDICTION OVER NONRESIDENT CLASS MEMBERS ASSERTED BY THE COURT BELOW GREATLY EXCEEDS THE LIMITS ON STATE COURT JURISDICTION ESTABLISHED BY THE CONTROLLING DECISIONS OF THIS COURT

A. The Court Below Ignores The Constitutional Requirement Of A Relationship Between A Forum State And A Nonresident To Support Jurisdiction

The Illinois Supreme Court held in this case:

> "The constitutionality of the present class action on behalf of nonresident members must be determined by

> asking (1) if plaintiff adequately represents the nonresident parties and (2) if notice can insure the class of its constitutional opportunity to be heard and protect each member's option to choose not to participate." (Cert. Pet. A5)

It is apparent that under this holding the Illinois state courts may adjudicate the rights of nonresidents who have no relationship whatever with the State of Illinois. In this respect the Illinois Supreme Court has totally ignored the prior opinions of this Court defining the limitations on state court jurisdiction.

At least since *Pennoyer* v. *Neff*, 95 U.S. 714 (1877), this Court has required a substantial relationship to exist between a State and any individual over whom its courts seek to assert jurisdiction.* Although the Court in *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), adopted a flexible "minimum contacts" standard by which to measure the sufficiency of that relationship, the Court always has insisted that some relationship exist. As recently stated by the Court in *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 291-292 (1980):

> "As has long been settled, and as we reaffirm today, a state court may exercise personal jurisdiction over a nonresident defendant only so long as there exist 'minimum contacts' between the defendant and the forum State. *International Shoe Co.* v. *Washington, supra*, at 316. The concept of minimum contacts, in turn, can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or in-

* *Pennoyer* required that the individual over whom the State wished to assert *in personam* jurisdiction either be present within the State for service of process or make a "voluntary appearance." The "presence" requirement has given way to the "minimum contacts" test of *International Shoe*. The alternative requirement of a voluntary appearance has remained unchanged since *Pennoyer*.

> convenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system."

The fundamental nature of the requirement of a relationship between a forum State and an individual over whom it seeks to assert jurisdiction is illustrated by a quartet of recent cases in which this Court has reversed assertions by state courts of jurisdiction over nonresidents because of the absence of sufficient "contacts." *Rush* v. *Savchuk,* 444 U.S. 320 (1980);* *World-Wide Volkswagen Corp.* v. *Woodson,* 444 U.S. 286 (1980); *Kulko* v. *California Superior Court,* 436 U.S. 84 (1978); *Shaffer* v. *Heitner,* 433 U.S. 186 (1977).

The court below suggests (Cert. Pet. A4) that this Court's decision in *Hansberry* v. *Lee,* 311 U.S. 32 (1940), made class actions an exception to the *Pennoyer* and *International Shoe* approach to state court jurisdiction. The *Hansberry* case, however, did not present any issue of state court jurisdiction. It involved the enforceability of a prior Illinois state court judgment, entered in an action between Illinois landowners, which declared that a racially restrictive covenant applicable to certain Illinois properties was valid and binding on all the property owners. The *holding* in that case was that certain of the property owners were *not* bound by the judgment because their interests had not been adequately represented in the prior proceeding. The Court nevertheless went on to make some general remarks about the nature of class actions, including the observation that courts are sometimes called upon to proceed with causes in which joinder of all those interested is difficult or impossible because, *inter alia,* "some are not

* In *Rush* v. *Savchuk,* the Court noted that a total absence of contacts was determinative of the lack of jurisdiction, regardless of other factors (444 U.S. at 332-333).

within the jurisdiction" (311 U.S. at 41-42). This passage, which clearly is dictum and does not itself relate to due process requirements at all, is what the court below relies upon (see Cert. Pet. A4, where the passage is set out).

The general remarks in *Hansberry* do not purport to address any aspect of state court jurisdiction. No jurisdiction issue was present in the case, so there was no reason for this Court even in dicta to consider such an issue, particularly since all class members appear to have been residents of Illinois and since the land in question was in Illinois. The Court's statements in *Hansberry* could at most have been meant to identify the procedural steps necessary to adjudicate claims of a class *over which jurisdiction was assumed.*

The Court's citation in *Hansberry,* in the very passage relied upon by the court below, of *Hartford Life Insurance Co.* v. *Ibs,* 237 U.S. 662 (1914), and cases following *Ibs* reinforces this conclusion (311 U.S. at 41). In *Ibs,* a case which, unlike *Hansberry,* involved the validity of a state court class action judgment applicable to nonresidents, the Court specifically addressed the question of jurisdiction over nonresidents and found an independent basis for jurisdiction to exist before discussing the propriety of the class action procedure (see 237 U.S. at 671). Furthermore, in *Christopher* v. *Brusselback,* 302 U.S. 500 (1938), another case cited in *Hansberry* in the passage in question (311 U.S. at 41), the Court held that personal liabilities of stockholders could be enforced only "in a court having jurisdiction to render a judgment against them *in personam*" (302 U.S. at 502) and that, when no basis for such jurisdiction existed, the class action procedure provided for federal courts by former Equity Rule 38 was inapplicable (302 U.S. at 505). The citation of these cases in *Hansberry* clearly indicates that this Court had no intention of aban-

doning the traditional requirements of personal jurisdiction in class actions.*

Moreover, *Hansberry* was decided in 1940, five years before *International Shoe*. Even if the *Hansberry* dictum had any jurisdiction-broadening implications, it must be read as pertaining to the strict tests of "presence" and "consent" then in force. It would be wrong to read *Hansberry* as authority for a departure from the more flexible "minimum contacts" test of *International Shoe* that was developed *after* the oblique dicta in *Hansberry*. It would also be inappropriate to read into *Hansberry*, a case involving a class of persons affiliated by legal obligations to each other arising out of privity of contract or privity of estate, any implications whatever as to jurisdiction over the modern "common question" class action that is involved in this case, which is designed to render a binding adjudication of the rights of class members who have no such legal relationship to each other.

The idea that the "common question" class action, a mere procedural device intended to facilitate joinder of similar but unaffiliated claims, by itself, could change the well established constitutional limitations on state court jurisdiction that would apply to the claims if litigated individually is a startling one. It is not reasonable to assume that this Court would have adopted such a novel proposition in a case in which the issue was not in any way presented.

The court below also suggests, citing *Shutts* v. *Phillips Petroleum Co.*, 222 Kan. 527, 567 P.2d 1292 (1977), *cert.*

* In its subsequent decision in *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), involving the effect of a state court judgment in a representative proceeding settling the accounts of a trust having numerous nonresident beneficiaries, the Court again addressed the jurisdiction issue separate and apart from the issue as to the validity of the New York notice and representation procedure (339 U.S. at 311-313).

denied, 434 U.S. 1068 (1978), that this Court's established principles of state court jurisdiction are applicable only to defendants, not absent plaintiffs (Cert. Pet. A3-A4). It is true that most decisions of this Court with respect to state court jurisdiction issues have involved jurisdiction over nonresident defendants, but this is neither surprising nor suggestive of a different rule for absent plaintiffs. The plaintiff ordinarily institutes an action, and his voluntary appearance generally precludes any jurisdictional attack by him, even as to counterclaims. *Adam* v. *Saenger,* 303 U.S. 59 (1938). Jurisdiction over a party denominated as "plaintiff" who does *not* make a voluntary appearance, however, must be based on other grounds, and those do not differ from the grounds applicable to a defendant. An examination of the functional character of parties to this Court's jurisdiction decisions reveals that the Court has applied the same standards to all types of parties. Thus in *New York Life Ins. Co.* v. *Dunlevy,* 241 U.S. 518 (1916), the Court held that a state court could not constitutionally assert jurisdiction over a nonresident claimant in an interpleader action, applying the rule of *Pennoyer* v. *Neff.* In *Vanderbilt* v. *Vanderbilt,* 354 U.S. 416 (1957), and *Estin* v. *Estin,* 334 U.S. 541 (1948), the Court found an absence of jurisdiction over claimants on marital obligations, again citing *Pennoyer.* In *Hanson* v. *Denckla,* 357 U.S. 235 (1958), the Court applied *International Shoe Co.* v. *Washington* in reversing a Florida court decision that it had jurisdiction over a Delaware trustee that was a mere stakeholder. And more recently, in *Shaffer* v. *Heitner,* 433 U.S. 186, 212 (1977), the Court stated, in a passage it has repeated in later decisions:

> "We therefore conclude that *all* assertions of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny." (Emphasis supplied)

There is, moreover, no reason why the test of state court jurisdiction over a non-consenting claimant should differ from the test of jurisdiction over persons resisting claims. Denial or foreclosure of a claim that an individual has been wronged by another person is no less substantial an impairment of a property right or an exercise of state power than is imposition of a liability, and jurisdiction to effect such a denial should not be subject to lesser constitutional restriction than jurisdiction to impose a liability.

As will be more fully discussed below, the need to impose limitations on the judicial power of the States because of their status as "coequal sovereigns in a federal system," as discussed in *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. at 292, is at least as applicable to jurisdiction over nonresident plaintiff class members as to jurisdiction over other parties. The Illinois Supreme Court's conclusion that notice and adequate representation are a sufficient substitute for the traditional bases of state court jurisdiction therefore must be rejected as without support in, and as squarely contrary to, the prior decisions of this Court, as the courts of Pennsylvania and New Jersey already have done in *Klemow* v. *Time, Inc.*, 466 Pa. 189, 197 n.15, 352 A.2d 12, 16 n.15 (1976), and *Feldman* v. *Bates Mfg. Co.*, 143 N.J. Super. 84, 362 A.2d 1177 (App. Div. 1976). See also Note, *Multistate Plaintiff Class Actions: Jurisdiction and Certification*, 92 Harv. L. Rev. 718, 729-731 (1979).

B. There Is No Relationship Between Illinois And The Nonresident Class Members

The respondent has conceded the absence of "minimum contacts" between nonresident class members and Illinois (see Cert. Pet. A3). The record makes this conclusion inescapable. The sales promotion that is the subject of this action was planned and executed in Massachusetts, where Gillette has its corporate headquarters. Gillette is incorpo-

rated in Delaware. Responses to the promotion were mailed to Minnesota, where they were processed by an agent of Gillette. No aspect of the promotion took place in the State of Illinois other than seeking responses to the promotion from persons in Illinois.

Class members who are not residents of Illinois thus had no contact whatever with Illinois in participating in the promotion and had no reason to believe or foresee that they were establishing such a contact. Nor do they have any kind of legal relationship with the Illinois class members or even among themselves. This is not a case involving joint property interests or rights of members in a common enterprise, and adjudication of one claim is not dispositive of others. The sole basis for a class action here is the assertion that the damage claims of the various class members present the same factual issues. The rights of the Illinois class members therefore can be fully and effectively litigated without any reference to those who responded to the promotion from outside Illinois.

Respondent similarly has made no assertion that jurisdiction over nonresident class members can be based upon voluntary appearance or other consent. Although Section 57.5 of the Illinois Civil Practice Act (Ch. 110, Par. 57.5, Ill. Rev. Stat.) gives class members the right to exclude themselves from the litigation ("opt out"), and thereby avoid being bound by the judgment, the failure to opt out obviously is not a voluntary appearance, and it cannot be considered a manifestation of actual consent sufficient to waive a constitutional right. More often than not it will be the result of "ignorance, timidity, unfamiliarity with business or legal matters" or mere unconcern. Cf. Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv.L.Rev. 356, 398 (1967). And it is equally clear that

a failure to opt out cannot bestow jurisdiction on a state court under the guise of "implied consent." "Implied consent" is a legal fiction which is effective to support jurisdiction only when there already are contacts with the forum State "of such a nature as to justify the fiction." *International Shoe Co.* v. *Washington*, 326 U.S. 310, 318-319 (1945). A state court that has no constitutional power to assert jurisdiction over a nonresident cannot fabricate that power by compelling a nonresident to take affirmative action to avoid its assertion.*

It thus is apparent that neither the minimum contacts nor the voluntary appearance needed to permit state court jurisdiction over nonresidents under the requirements of this Court's precedents over the past 105 years is present here. Respondent in fact has never even suggested the contrary. Because those requirements are fully applicable in this case, the decision of the Illinois Supreme Court must be reversed.

II. THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT "ACTING AS AN INSTRUMENT OF INTERSTATE FEDERALISM" PROHIBITS ILLINOIS FROM ASSERTING JURISDICTION OVER NONRESIDENT CLASS MEMBERS IN THIS CASE

As noted above, the limitations placed upon state court jurisdiction by the decisions of this Court stem from con-

* The power of federal courts to bind members of nationwide classes who do not "opt out" of common question class actions brought under Rule 23(b)(3) of the Federal Rules of Civil Procedure provides no authority for recognition of such a power in state courts, because, at least in non-diversity cases, the Constitution does not impose territorial jurisdictional limitations on federal courts of the same nature as those imposed on the States "by their status as coequal sovereigns in a federal system."

siderations of convenience to parties and of state sovereignty in our federal system, both of which derive from the Due Process Clause of the Fourteenth Amendment.

The decision below ignores both considerations. It causes inconvenience to parties because nonresident class members cannot easily intervene in a distant State with which they have no contacts to question the conduct of the class representative, or object to a proposed settlement, or otherwise protect their rights. This is especially troublesome when, as here, the class representative's claim is not governed by the same law as the claims of nonresidents. See note, page 19, *infra*.

Particularly offensive, however, is this decision's disregard of the principles of state sovereignty, which are included within the Due Process Clause "acting as an instrument of interstate federalism." *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 294 (1980)

A. The Decision Below Authorizes An Invasion By One State Of The Judicial Power Of Another That Totally Disregards The Attributes Of Sovereignty Retained By The States Under The Constitution

The decision below must be reversed because it authorizes encroachments on state judicial power that are inconsistent with our federal system of government. As stated in *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 293-294 (1980):

> "[W]e have never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we, and remain faithful to the principles of interstate federalism embodied in the Constitution. The economic interdependence of the States was foreseen and desired by the Framers . . . But the Framers also intended that the States retain many essential

attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each State, in turn, implied a limitation on the sovereignty of all of its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment.

* * *

"Thus, the Due Process Clause 'does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations.' *International Shoe Co.* v. *Washington*, 326 U.S. at 319. Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment."

Retention by the States of their "sovereign power to try causes in their courts" insures the availability of local forums for the resolution of disputes, promotes the development by each State of a body of law best adapted to serve the needs of its citizens, and puts the courts under the political control of those whom their decisions affect. The intent of the Framers as to such fundamental principles of our government cannot be ignored merely to further supposed interests of special groups or undemonstrated economies of judicial administration. As stated in *Erlanger Mills, Inc.* v. *Cohoes Fibre Mills, Inc.*, 239 F.2d 502, 509 (4th Cir. 1956):

"If one State may, without violation of the due process clause, extend the authority of its courts beyond its boundaries over persons and situations not sufficiently related to that State, the separate identity

> of the States will be reduced to a mere fiction. Individual states could undertake at the expense of other States to enlarge the sphere of their authority to nationwide dimensions. It requires no flight of fancy to foresee the resulting maze of lawsuits adjudicating the interests of persons having only the faintest and most remote links with the State exercising authority. If the due process clause is not effective to restrain such extensions of local power, then the federal system is likely to be transformed into something very different from anything we have known."

The Illinois Supreme Court erred because it failed to appreciate or even recognize the sovereignty of the other States with respect to judicial power which is preserved by the Constitution. Its sole emphasis on notice and representation as the foundation of state court power makes state lines meaningless. A theory of state court authority which takes no account whatsoever of the citizenship or residence or even location of the parties, or the relationship of their conduct or the matters to be adjudicated to the forum State, cannot be squared with the principles of our federal system and therefore must be rejected.

B. The Invasion Of The Judicial Power Of Other States Contemplated By The Decision Below Will Cause Unjustified Interference In The Orderly Administration Of The Laws Of Those States

An important purpose of the limitations on state court jurisdiction established by this Court, and ignored in the decision below, is to secure "the orderly administration of the laws." *International Shoe Co.* v. *Washington*, 326 U.S. 310, 319 (1945); *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 294 (1980). Permitting a state court to invade the sovereign judicial power of other States by exercising jurisdiction over class members who have no relationship with the State will substantially and unneces-

sarily interfere with the "administration of the laws" of the States which *do* have such a relationship.

1. The decision below will cause the laws of the States to be improperly applied

The most serious interference with the administration of the laws resulting from the assertion of jurisdiction adopted by the court below is the substantial likelihood that the forum State will nullify the policies of other States by reaching a different result in adjudicating the claims of their citizens than would be reached in the courts of such States.

There simply is no reason to believe that if States were allowed to assert jurisdiction over national classes, a forum State without contacts with nonresident class members would decide questions of law affecting their claims in the same way as would the courts of a State having a relationship with them. The forum State may not even apply the same law as an interested State, in view of the wide latitude this Court has permitted in the choice of law rules selected by state courts. *Allstate Insurance Co.* v. *Hague,* 449 U.S. 302 (1981).* Even if, as is true in this case (see Cert. Pet. A8-A9), the forum State attempts to apply the law of each class member's residence State, there is considerable doubt that that law will be determined correctly. Often the law of another State will be uncertain or unascertainable or will be undergoing changes not readily apparent to outsiders.

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* *Allstate Insurance Co.* v. *Hague* does require "contacts" between a State and the parties or the transaction or occurrence giving rise to a claim before that State's law may be applied to the claim. Thus the Illinois courts could not constitutionally apply Illinois law to the nonresident claims here. Gillette argued below that because of this the Illinois plaintiff in this case, whose claim is expressly brought under Illinois law, cannot be an "adequate representative" of nonresidents but this contention was rejected by the court (Cert. Pet. A5-A6).

The determination of unsettled state law is a very difficult task, as this Court has recognized in other contexts. See, e.g., *Moor* v. *County of Alameda*, 411 U.S. 693, 715-716 (1973); *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496, 499 (1941); *Thompson* v. *Magnolia Petroleum Co.*, 309 U.S. 478, 483-484 (1940).

Such difficulties are abundant in this case, involving, as it does, an area of the law (consumer protection) that has been developing at different paces in different jurisdictions. Among the issues presented in deciding the merits here are (1) whether state consumer fraud laws create private rights of actions, (2) whether such laws require any conduct to be undertaken to retract a promotional offer when the supply of the promotional item is exhausted, and, if so, the extent of that action, (3) whether damages for violation of such laws are to be measured by "out-of-pocket," "benefit of the bargain," or some other standard, (4) whether advertising constitutes an "offer" in a contractual sense, (5) whether, if there was an offer, the acquisition of proofs of purchase was a "bargained for" act that could constitute consideration to support a contract, and (6) whether receipt of and acquiescence in Gillette's substituted promotional gift constituted a compromise of any claim. As to many if not all of these issues there is not only wide divergence among the States, but also an absence of authority in many States. See, e.g., Annot., *Practices Forbidden by State Deceptive Trade Practices and Consumer Protection Acts*, 89 A.L.R.3d 449 (1979); Annot., *Right to Private Action Under State Consumer Protection Act*, 62 A.L.R.3d 169 (1975); Annot., *Advertisement Addressed to Public Relating to Sale or Purchase of Goods at Specified Price as an Offer the Acceptance of Which Will Consummate a Contract*, 43 A.L.R.3d 1102 (1972).

The forum State hearing a nationwide class action also may apply rules of evidence, or statutes of limitations, or other procedural law that would cause its adjudication of nonresident claims to differ from the result in a State with an interest in the claims.* Such procedural law may be itself inconsistent with policies of other States and also may produce an outcome in the litigation which frustrates the policies of other States.

The expansive assertion of jurisdiction adopted by the court below leads to other kinds of interference in the "orderly administration of the laws" of the several States. It is highly doubtful whether, in a case where a jury trial is requested, the jury could or would, even if correctly instructed, accurately apply numerous sets of different state laws. A forum State in a nationwide class action also may be required to decide matters of fact and law that other States have committed to the expertise of an administrative

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* In this case, for example, Gillette will seek to introduce into evidence internal documents showing the reasonableness of its conduct, and an unsolicited award presented to it by a Nevada television station commending Gillette for its handling of the promotion involved in this case. Such evidence may not be admissible under the laws of every State, yet it is unlikely that the Illinois trial court will attempt to apply each State's law of evidence. Conversely, plaintiff here will possibly attempt to apply Illinois law as to corporate attorney-client privilege which is inconsistent with policies adopted by this Court and many state courts. See *Consolidation Coal Co.* v. *Bucyrus-Erie Co.*, 89 Ill. 2d 103, 432 N.E. 2d 250 (1982) (reaffirming the "control group" test notwithstanding its rejection by this Court in *Upjohn Co.* v. *United States*, 449 U.S. 383 (1981)). Furthermore, the Illinois Consumer Fraud and Deceptive Business Practices Act on which Count I of the Amended Complaint here is based permits recovery of attorneys' fees by a successful claimant. Ch. 121½, Par. 270a(c), Ill.Rev.Stat. Such relief is not authorized by all States.

agency. See Brief of Amici Curiae the National Association of Independent Insurers, et al., in Support of Petition for Writ of Certiorari, p. 9, filed herein. Despite its best efforts, a court in one State would find it extremely difficult to divine the policies and nuances of statutory interpretation of rights remitted to an experienced agency in another State.

The danger that the policies of interested States would be ignored or misapplied is enhanced by the forum shopping opportunities presented by the Illinois Supreme Court's rejection of limitations on jurisdiction. Under that decision a lawyer for a would-be class action plaintiff can bring a nationwide class action in whichever of the 50 States he thinks is most sympathetic, or has conflict of laws rules or other procedural law most favorable, to the claims asserted—or which has the most favorable law on attorneys' fees.* Conversely, a party anticipating claims being asserted against him might attempt to file a declaratory judgment action against a class of claimants in a forum he thinks favors his position. In either event there is an increased likelihood that disputed issues of fact and unsettled questions of applicable law will not be decided in a manner consistent with the policies of the numerous States having direct and substantial interests in the resolution of claims held by their own citizens.

In summary, the decision below permits a State without any interest in particular conduct outside its borders to assert jurisdiction over a dispute involving that conduct without being asked to do so by anyone involved and thereby to frustrate the policies with respect to such conduct of States in which the conduct occurs. See the dissenting opin-

* The reasoning of the Illinois Supreme Court's opinion does not require even the representative plaintiff to have contacts with the forum State.

ion below (Cert. Pet. A16, A18). Since jurisdiction is being asserted over a class that can contain thousands or even millions of people, the scope of that frustration can be very large—a result certainly inconsistent with "the orderly administration of the laws" and with the respect one State should accord the judicial power of other States in our federal system. See Note, *Multistate Plaintiff Class Actions: Jurisdiction and Certification*, 92 Harv.L.Rev. 718, 733 (1979).

2. The decision below will lead to jurisdictional conflicts among the States

The broad and unprecedented jurisdiction asserted by the decision below also interferes with the administration of justice in the courts of every other State by substantially increasing the possibility of conflicts among those courts. Since eliminating any territorial jurisdictional limitations on state court class actions means that all 50 States can entertain a class action on behalf of the same nationwide class, it is inevitable that in many instances the same action will be brought in more than one State, encouraging races to the courthouse by the lawyers who often specialize in these actions. If every State were permitted to entertain nationwide class actions, there would be no efficient mechanism for resolving the resulting jurisdictional conflict. Certainly this Court should apply the Constitution in a way that will prevent these unseemly conflicts in the absence of any substantial justification for permitting them to occur.

3. There is no justification for permitting the interference with the orderly administration of the laws resulting from the invasions of state judicial power authorized by the decision below

Although intrusions on the judicial power of one State by another might be justified in circumstances in which a

significant interest of the forum State is involved, there is no such justification when, as here, Illinois has no interest in the controversy being adjudicated beyond protecting its own residents. The court below cited as a justification for its decision "the inability of the court to entertain the actual appearance of all members of the class as well as the impracticality of having each member prosecute his individual claim" (Cert. Pet. A5). This argument erroneously assumes that the alternative to a single nationwide class action in a State without contacts with nonresident class members is a series of individual actions. In fact, the alternative is one or more class actions in the State or States that *do* have a constitutionally sufficient relationship with class members.

Imposing "minimum contacts" limitations on the ability of a State to assert jurisdiction over a nationwide class will not eviscerate the utility of the class action procedure. In many situations there will be one State that has a sufficient relationship with the members of a nationwide class to support jurisdiction over all of them in a single action. This will usually be true, for example, of class actions seeking to adjudicate joint interests in property, or the rights *inter se* of members of a voluntary association, or contractual or commercial activities relating to the forum. In those kinds of controversies in which it is most desirable to provide a single class action forum, there is likely to be a State with sufficient contacts to provide it.

Even when the alternative is multiple state class actions, cliches about efficiency and economy do not justify permitting a State to assert jurisdiction over class members that have no relationship with it. The possibility of saving some litigation cost does not justify abandoning fundamental notions of interstate federalism. Moreover, there may be no economies from a nationwide action in one State because other States still may have to litigate the claims of opt-outs, or because jurisdictional conflicts among

several similar nationwide actions will have to be resolved. Even in the absence of these problems, the practical difficulties in administering a nationwide class action, such as determining and applying the substantive laws of other States, deciding which procedural laws to follow, certification of subclasses, supervising and handling notice and responses thereto, and assuring adequate representation of nonresidents, impose burdens on the court as great as, and in some respects in excess of, those that would be incurred in separate class actions in individual States. As noted in the dissenting opinion below, "class actions of this magnitude" are "time consuming and difficult to manage," constitute "unusual burdens on an already burdened court system" and therefore are unlikely to be an "*efficient* utilization of the resources of" Illinois (Cert. Pet. A16-A17, A19, emphasis in original).

Finally, the assertion of jurisdiction in this case cannot be constitutionally justified by any legitimate interest of the State of Illinois. Quite to the contrary, because it will be far more expensive for Illinois to adjudicate claims of a nationwide class than of a class limited to its own residents, the decision below imposes burdens inimical to the efficient functioning of the Illinois courts. See the dissenting opinion below (Cert. Pet. A16-A17, A18-A19). And it is highly presumptuous for Illinois to justify interference in the judicial affairs of the other States solely on the ground that it is easing the burden on their courts. Absent approval from the other States,* it cannot

* The Uniform Class Action Act limits the basis for jurisdiction over nonresident class members to those grounds that would support jurisdiction in an individual action against the nonresident, but contains an optional provision allowing jurisdiction over nonresidents whose State of residence has approved the assertion of such jurisdiction. National Conference of Commissioners on Uniform State Laws, Uniform Class Action [Act] [Rule], § 6. See Scher, *Uniform Class Action Act: A Critical View*, 63 A.B.A.J. 840, 842 (1977). Illinois has not adopted this Act (Cert. Pet. A13), and this basis for jurisdiction is therefore unavailable here.

be assumed that any theoretical economies are an adequate trade-off for surrendering a portion of a State's sovereignty. There are many areas in which considerable economies could be achieved by a uniform national administration of the laws, but the Constitution very clearly gives control of state matters to the individual States regardless of any such economies. U.S. Constitution, Amendment X.

CONCLUSION

For the reasons stated, the judgment of the Illinois Supreme Court should be reversed insofar as it applies to petitioner's motion to dismiss claims of nonresident class members, and the order of the Circuit Court of Cook County, Illinois, granting such motion should be affirmed.

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June 1, 1982

Respondent's Brief

Office - Supreme Court, U.S.
FILED
AUG 5 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1493

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

THE GILLETTE COMPANY,

Petitioner,

vs.

STEVEN MINER,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of The State Of Illinois

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QUESTIONS PRESENTED

Does a defendant in a plaintiff class action have standing to assert the due process rights of plaintiff class members?

If so, does a state court violate the due process rights of plaintiff class members who are neither residents of nor have contacts with the forum State by entertaining a plaintiff class action brought, in part, on their behalf?

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No. 81-1493

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

THE GILLETTE COMPANY,

Petitioner,

VS.

STEVEN MINER,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of The State Of Illinois

BRIEF FOR THE RESPONDENT

STATEMENT OF THE CASE

Respondent Steven Miner brought this class action in the Circuit Court of Cook County, Illinois on behalf of a class of consumers who were allegedly deceived by petitioner The Gillette Company ("Gillette") in the operation of a nationwide campaign to promote sales of its "Cricket" disposable butane lighters. Having accepted Gillette's unconditional offer of a "free" Accent table lighter (which the promotion package acknowledged had a "$7.95 Retail Value"), and having submitted

proofs of purchase of two Cricket lighters and payment of 50¢ to Gillette, respondent and each of the members of the plaintiff class seek damages resulting from Gillette's refusal to supply them with their "free" Accent table lighters.

In Count I of his Amended Complaint (J.A.4), plaintiff alleges that Gillette's conduct of its promotional campaign violated the Illinois Consumer Fraud and Deceptive Business Practices Act, Ill.Rev.Stat. (1979) Ch.121½, §§261, *et seq.* Specifically, plaintiff alleges that:

> "Notwithstanding the fact that defendant Gillette soon after its promotional campaign was initiated became aware of the fact that it would not have an adequate supply of Accent table lighters available to fill orders received from members of the public accepting defendant's unconditional offer, it fraudulently and deceptively concealed such fact from prospective purchasers by continuing to extensively advertise and promote its 'free' Cricket promotional offer, taking no steps to acquire an additional supply of Accent table lighters nor withdrawing its offer." (J.A.5).

In Count II, plaintiff alleges that, having accepted Gillette's unconditional promotional offer, Gillette's refusal to comply with the terms of its offer and supply members of the plaintiff class with their "free" Accent lighters constituted a breach of contract.*

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* Through its Statement of the Case (Brf. for Pet. at 2-3) and its footnote reference to "internal documents showing the reasonableness of its conduct" (Brf. for Pet. at 21), Gillette seeks to imply that performance of its contractual obligations was rendered impossible because of the exhaustion of its supply of Accent lighters. These same "internal documents," however, show that Gillette rejected the option of producing additional Accent lighters because the "[n]otification and handling process is expensive," and explain why Gillette did not raise impossibility of performance as a defense to plaintiff's claims. (J.A. 22-27).

Initial discovery disclosed that the class of injured persons in this case is not limited to residents of Illinois. In its answer to an interrogatory propounded by plaintiff, Gillette stated that of the 179,580 orders for "free" Accent lighters not filled, 11,456 were from persons requesting that their Accent lighters be mailed to addresses in the State of Illinois (J.A.13, 17, 32). Gillette is licensed to do and does substantial business in the State of Illinois.

On July 10, 1979 petitioner filed a Motion to Dismiss the Amended Complaint insofar as it was brought as a class action, and, in the alternative, to dismiss the Amended Complaint:

> "insofar as it is brought in a representative capacity on behalf of persons who are not residents of the State of Illinois because this Court has no jurisdiction to adjudicate the claims of such persons, the claims of such persons do not share common questions with the claim of Plaintiff, and Plaintiff cannot fairly and adequately protest (sic) the interests of such persons." (J.A.20).

As to the first ground of its motion to dismiss, petitioner argued, *inter alia*, that each individual's claim requires separate consideration; the claims of $7.95 are *de minimus*; and that common issues do not predominate as required by statute. The Illinois class action statute, Ill.Rev.Stat. (1979) Ch.110, §§57.2-57.7, requires not only, as petitioner suggests (Brf. for Pet. at 3), that "there are questions of fact or law common to the class, which common questions predominate over any questions affecting only individual members," but, like Rule 23(a), Fed.R.Civ.P., 28 U.S.C., requires numerosity, fair and adequate representation, and a finding that "[t]he class action is an appropriate method for the fair and efficient adjudication of the controversy." *Id.*, §57.2(a). The trial court, finding the requisites of Section 57.2(a)

satisfied by the allegations in respondent's Amended Complaint, ruled that respondent's action could be maintained as a class action and denied petitioner's motion (J.A.21).

The trial court, however, granted petitioner's alternate motion to dismiss the "nonresident" members from the plaintiff class and certified that part of its ruling for interlocutory appeal. On October 3, 1980 the Illinois Appellate Court for the First District affirmed both parts of the Order of the Circuit Court. (Cert.Pet. A20-A28).

The Illinois Supreme Court reversed the decision of the Appellate Court and the Circuit Court's Order dismissing the Amended Complaint as to the nonresident members of the putative class, and remanded the case to the Circuit Court for further proceedings. The court rejected petitioner's contention that minimum contacts are required of nonresident plaintiff class members,* holding that the constitutionality of the action on behalf of nonresident members is assured when the "plaintiff adequately represents the nonresident parties and notice can insure the class of its constitutional opportunity to be heard and protect each member's option to choose not to participate." (Cert.Pet. at A5). The court noted that such questions "are matters for the trial court's further determination." (Cert.Pet. at A6). Finally, the court observed that:

> "The present case is predicated upon a series of essentially identical transactions by thousands of purchasers, including Illinois residents, which were founded upon and arose out of identical language in

* The dissenting opinion agreed with the majority "that a departure from the 'minimum contacts' requirement is permissible" in this case. (Cert.Pet. at A13).

the promotional offer prepared by defendant." (Cert. Pet. at A10).

Respondent to date has not moved for certification of the plaintiff class. No motion is pending nor any judgment entered nor any settlement proposed with regard to the merits of plaintiff's substantive claims. There is no record of any other action pending in any other court against Gillette arising out of its Accent table lighter promotion, either on an individual basis or as a class action.

SUMMARY OF ARGUMENT

Petitioner may not claim standing in this Court to vindicate the due process rights of nonresident plaintiff class members. *Singleton v. Wulff*, 428 U.S. 106 (1976). Petitioner is in a direct adversary relationship with the plaintiff class, has no interest in the subject matter of the appeal or in the substantive case in common with the members of the plaintiff class, and nonresident class members have the ability and proceedings available to assert their own due process rights, which are matters of their own individual liberties. Further, this case is not ripe for review, because no class has been certified and no adverse judgment has been entered against the class; thus the due process issues advanced here are speculative claims of future harm and ought not be addressed by this Court. *Golden v. Zwickler*, 394 U.S. 103 (1969).

Moreover, this Court has long recognized the special jurisdictional nature of class actions. *Hansberry v. Lee*, 311 U.S. 32 (1940). Due process does not require that class members have presence in or contacts with the

forum State, but rather that the class members' interests be adequately represented. There is no justification for imposing a "minimum contacts" requirement on plaintiff class members because adequate representation assures that class members are protected against the burdens of litigating in a distant or inconvenient forum. Further, there is no provision of interstate federalism or state sovereignty in the Due Process Clause, the only constitutional source of personal jurisdiction limitations, that would restrict the authority of a state court to include nonresidents in a plaintiff class. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinea*, 50 U.S.L.W. 4553 (1982).

Finally, there is no reason to believe that the lower court's ruling will disrupt the orderly administration of the laws of sister States. The class action is a flexible device, and allows a trial court to fashion a certification order in a manner that would maximize the economies of litigation without causing jurisdictional conflicts among States. A state trial court is also capable of identifying and accommodating the interests of sister States, particularly where the States share the same interest in furthering fundamental substantive social policies. Thus, neither due process nor policy considerations preclude an Illinois court from maintaining a plaintiff class action which is brought, in part, on behalf of persons who are not residents of Illinois.

ARGUMENT

I.

THE DUE PROCESS RIGHTS OF NON-ILLINOIS MEMBERS OF THE PLAINTIFF CLASS CANNOT BE PROPERLY ASSERTED BY PETITIONER AND THE FOURTEENTH AMENDMENT ISSUES RAISED BY PETITIONER ARE NOT RIPE FOR REVIEW BY THIS COURT.

A. Petitioner Has No Standing To Assert The Individual Liberty Interests Of Its Adversaries.

Petitioner contends that the Illinois state trial court lacks personal jurisdiction over nonresident members of the putative plaintiff class, and therefore that court cannot adjudicate their respective claims for $7.95 against petitioner without violating their rights to due process. The requirement of personal jurisdiction, however, protects an individual's liberty interest only, and its purpose is to restrict judicial power solely as a matter of individual liberty. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinea*, 50 U.S.L.W. 4553, 4556 (1982). Petitioner's interest in the substantive case is to defeat the damage claims of the class, and its sole interest in the decision of this Court is to reduce its exposure from 179,580 claims to 11,456 claims. Petitioner has *no* personal liberty interest of its own at stake here, much less any interest akin to those of its adversaries.

As a general rule, "one may not claim standing in this Court to vindicate the constitutional rights of some third party." *Singleton v. Wulff*, 428 U.S. 106, 114 (1976), quoting *Barrows v. Jackson*, 346 U.S. 249, 255 (1953). The purpose behind this rule is twofold:

> "First, the courts should not adjudicate such rights unnecessarily, and it may be that in fact the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in court litigant is successful or not. . . . Second, third parties themselves usually will be the best proponents of their own rights." *Singleton v. Wulff*, 428 U.S. at 113-114.

In determining whether the assertion of *jus tertii* is proper, the Court has looked first to "the relationship of the litigant to the person whose right he seeks to assert," 428 U.S. at 114, and second to "the ability of the third party to assert his own right," 428 U.S. at 115-116. As to the first factor, petitioner and the non-Illinois members of the plaintiff class are in a direct adversary relationship. At the very least, it is doubtful that non-Illinois class members share petitioner's enthusiasm for denying them the opportunity to recover damages from petitioner through this lawsuit. This is particularly true because no other action has been brought arising out of the subject matter of this litigation, no individual actions are likely to be brought for the recovery of $7.95, and, as explained below, absent class members have no exposure even in the event of a judgment adverse to the class. As to the second factor, there is no question of the ability of a non-Illinois class member to "assert his own right," either by way of intervention (Ill.Rev.Stat. (1979) Ch.110, §57.5(a)), exclusion (*Id.* §57.5(b)), or collateral attack, *see, e.g., Hansberry v. Lee*, 311 U.S. 32 (1940); *Hartford Life Insurance Co. v. Ibs*, 237 U.S. 662 (1915).

Petitioner's interest in the due process rights of non-resident class members, being of questionable finality, is at best disingenuous. *Cf. Boeing Co. v. Van Gemert*, 444 U.S. 472, 488 (1980) (Rehnquist, J., dissenting). For example, in the event that a number of individual actions do arise out of the subject matter of this liti-

gation, petitioner would realize an interest, at conflict with its current position, of conserving legal expenses and resources by resolving all such claims in one proceeding. *See, e.g., In re: Northern District of California "Dalkon Shield" IUD Products Liability Litigation*, 526 F.Supp. 887 (N.D. Cal.1981), *rev'd*, ... F.2d ..... (9th Cir. 1982), *pet. for rehearing en banc pending*. A nationwide class would advance the interests of petitioner in "the protection of the *defendant* from inconsistent obligations" and "the provision of a convenient and economical means for disposing of similar lawsuits, . . ." *United States Parole Commission v. Geraghiy*, 445 U.S. 388, 402-403 (1980) (emphasis added).

It should also be noted that regardless of this Court's decision, petitioner must still defend the merits of this action brought on behalf of the 11,456 "Illinois" members of the plaintiff class. (Pet. at A9-A11). Thus, resolution of the purported due process issues at this premature stage will not save petitioner the time and expense of litigating the merits of this action.

B. The Due Process Claims Raised By Petitioner Are Not Ripe For Review By This Court.

Petitioner and its *amici* posit hypothetical issues which are presented neither by the facts nor the posture of this case. This case presents no issue of parallel or conflicting class or individual actions (Brf. for Pet. at 23); no race to the courthouse (*Id.*); no onslaught of collateral attacks of an unfavorable final adjudication (Pet. at 8); no forum shopping (Brf. of New England Legal Foundation at 28-29); no disruption of individual state regulations or administrative procedures (Brf. of National Association of Independent Insurers, *et al.* at 5-6); and no deprivation of a prospective plaintiff's right to have his claim adjudicated in another forum or under another

state's law (Brf. of "Dalkon Shield" Plaintiffs at 16). The most that petitioner can allege at this juncture is that *if* the plaintiff class is certified by the trial court *and if* the class does not prevail in its case in chief, then non-resident class members will have been deprived of their claims against petitioner without due process of law.

Speculative claims of future harm ought not be addressed by this Court until such harm occurs, *Golden v. Zwickler*, 394 U.S. 103 (1969), particularly where such claims are based on issues of constitutional significance. *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 341, 346-48 (1936) (Brandeis, J., concurring). This Court has often emphasized the necessity of a firm factual basis before ruling on important questions, *see*, *Public Affairs Associates v. Rickover*, 369 U.S. 111 (1962) and *United Public Workers v. Mitchell*, 330 U.S. 75, 90 (1947), and has rejected appellate review of class action issues in a piecemeal manner. *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978).

As discussed below, the Court has ruled many times on the question of whether a judgment in a plaintiff class action would be binding upon class members who were not residents of the forum State. *See*, *Hansberry v. Lee*, 311 U.S. 32 (1940); *Sovereign Camp of the Woodmen of the World v. Bolin*, 305 U.S. 66 (1938); *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921); *Hartford Life Insurance Co. v. Barber*, 245 U.S. 146 (1917); *Supreme Council of the Royal Arcanum v. Green*, 237 U.S. 531 (1915); *Hartford Life Insurance Co. v. Ibs*, 237 U.S. 662 (1915); *cf.*, *Underwriters National Assurance Co. v. North Carolina Life & Accident & Health Insurance Guaranty Association*, 50 U.S.L.W. 4319, 4324 (1982). Each of those decisions arose within a firm factual framework, *i.e.*, a class member seeking to enforce or attack a judgment in the court of a sister State, and in each case the

due process issues were championed by a party whose rights had been adjudicated in his absence. In the present posture of this case, however, the only issue is whether due process would be violated by the mere act of denying a motion to dismiss a complaint as to nonresident members of a putative plaintiff class. No liberty or property right of any non-Illinois class member has been affected; no such right could be affected, if at all, unless an Illinois court renders an adverse judgment against a certified nationwide class.

Accordingly, both because there is no ripe nor current claim of deprivation, and because petitioner lacks standing to champion the due process rights of its adversaries, this Court should decline to reach the constitutional question presented.

II.

DUE PROCESS DOES NOT PRECLUDE INCLUSION OF NONRESIDENTS AS MEMBERS OF A PLAINTIFF CLASS ACTION BROUGHT IN AN ILLINOIS STATE COURT.

A. The Class Action Is A Recognized Exception To The General Rule That A Court Cannot Bind Parties Who Are Not Before It.

This Court recognized the special jurisdictional nature of class actions in *Hansberry v. Lee*, 311 U.S. 32, 40-41 (1940):

> "It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.
>
> * * *

> "To these general rules there is a recognized exception that, to an extent not precisely defined by judicial opinion, the judgment in a 'class' or 'representative' suit, to which some members of the class are parties, may bind members of the class or those represented who were not made parties to it."

Hansberry held that there is a failure to satisfy due process only where the procedure adopted does not fairly protect the interests of absent class members who are to be bound by the judgment. 311 U.S. at 42. The Court reaffirmed the "familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present. . . ." 311 U.S. at 42-43.

Petitioner attempts to distinguish *Hansberry* on the ground that the case did not concern jurisdiction over nonresident class members having no connection with the forum State. (Brf. for Pet. at 9-11). The pronouncements of this Court in *Hansberry* cannot be viewed so narrowly. Indeed, the Court expressly noted the propriety of class suits involving nonresident class members:

> "Courts are not infrequently called upon to proceed with causes in which the number of those interested in the litigation is so great as to make difficult or impossible the joinder of all *because some are not within the jurisdiction* or because their whereabouts is unknown or where if all were made parties to the suit its continued abatement by the death of some would prevent or unduly delay a decree. In such cases where the interests of those not joined are of the same class as the interests of those who are, and where it is considered that the latter fairly represent the former in the prosecution of the litigation of the issues in which all have a common interest, the court will proceed to a decree." 311 U.S. at 41-42 (emphasis added).

The extension of the "minimum contacts" standard to plaintiff class members or, for that matter, any requirement of contacts with the forum other than the sharing of common interests with an adequate representative who is properly before the forum, is both unprecedented by any decision of this Court and contrary to *Hansberry*. By their very nature, class actions must proceed in the absence of most class members. *Schlosser v. Allis Chalmers Corp.*, 86 Wis. 2d 226, 241-42, 271 N.W.2d 879, 886-887 (1978).* This fact was recognized as "well-established" by the Court 130 years ago. *Smith v. Swormstedt*, 57 U.S. (16 How.) 288, 301-303 (1853). Thus, the touchstone of due process in the context of a class action is not whether a class member has presence in or contacts with the forum—indeed, if the class member is absent it makes no difference whether he is absent

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* *Schlosser* is illustrative of just how incongruous a "minimum contacts" standard would be if applied to the members of a plaintiff class. In that case a nationwide class was certified consisting of retired salaried employees who were denied certain retirement benefits by the defendant corporation. Petitioner in the court below attempted to distinguish *Schlosser* as a case in which there were jurisdictional "contacts between the non-resident class members and the forum state" simply because the defendant corporation had its principal place of business in the forum state. (Brf. of Defendant-Appellee in the Illinois Supreme Court at 38). However, there was no evidence that any of the former employees who resided outside Wisconsin in twenty-one states and two countries had contracted in Wisconsin, had performed any part of their contract in Wisconsin, or had ever been to that State. Thus, had the tables been turned, and had the defendant corporation been suing its former employees under the same contract which provided the basis for the plaintiff class action, a Wisconsin court could not have asserted long-arm jurisdiction over the nonresident employees, as the employees' conduct could not have been considered such that they could have reasonably anticipated "being haled into court" in Wisconsin. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

within or outside of the forum State—but rather whether the class member's interests have been adequately represented. *Sam Fox v. United States*, 366 U.S. 683, 691 (1961) ("the judgment in a class action will bind . . . those members of the class whose interests have been adequately represented by existing parties to the litigation."); *Hansberry v. Lee*, 311 U.S. 32 (1940); *Sovereign Camp of the Woodmen of the World v. Bolin*, 305 U.S. 66 (1938); *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921); *Hartford Life Insurance Co. v. Barber*, 245 U.S. 146 (1917); *Supreme Council of the Royal Arcanum v. Green*, 237 U.S. 531 (1915); *Hartford Life Insurance Co. v. Ibs*, 237 U.S. 662 (1915). Accordingly:

> "The class or representative action represents an exception to the principle that assures an individual right to a day in court. The justification for permitting it is that considerations of efficiency and economy and good practice permit issuing an order rendering a judgment that binds everyone in a defined group who was properly represented before the court and therefore has had a day in court vicariously." Miller, *An Overview of Federal Class Actions: Past, Present and Future*, 4 Just.Sys.J. 197, 204 (1978).

See also *Restatement (Second) of the Law of Judgments*, §85(2) (Tent. Draft No. 2, 1975).

The realization that "the class action device serves a useful function across the entire range of legal questions," *Snyder v. Harris*, 394 U.S. 332, 341 (1969), has resulted in other exceptions to traditional jurisdictional concepts. For example, in the federal system the class action provides an exception to the requirement of complete diversity between plaintiffs and defendants in an action brought on the basis of diversity of citizenship, even though the nondiverse members of the class "are citizens of the same State as the defendant and have

nothing to fear from trying the lawsuit in the courts of their own State." 394 U.S. at 340. This exception is particularly significant in that the requirement of subject matter jurisdiction, unlike personal jurisdiction, flows from Article III of the Constitution, was not intended to protect an individual liberty interest but constitutes a restriction on federal power, and cannot be waived or conferred by affirmative consent of the parties. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinea*, 50 U.S.L.W. 4553, 4555-4556 (1982).

Petitioner places unfounded reliance on *Rush v. Savchuk*, 444 U.S. 320 (1980); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Kulko v. California Superior Court*, 436 U.S. 84 (1978); and *Shaffer v. Heitner*, 433 U.S. 186 (1977), for the proposition that "minimum contacts" are required of nonresidents to include them as members in a plaintiff class. (Brf. for Pet. at 9 and 12). Not one of those cases, all of which concerned jurisdiction over nonresident defendants, in any way diminishes the "recognized exception" to the requirement of *in personam* jurisdiction in class actions. Hence, in *Rush v. Savchuk*, 444 U.S. 320 (1980), the Court explained exactly what it meant by the phrase from *Shaffer*, upon which petitioner has repeatedly relied (Cert.Pet. at 9; Brf. for Pet. at 12):

> "In *Shaffer v. Heitner* we held that 'all assertions of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny.' 433 U.S. at 212. *That is, a State may exercise jurisdiction over an absent defendant only if the defendant has 'certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.'*" 444 U.S. at 327 (emphasis added).

It is significant that in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), this Court found "other

relevant factors" wholly independent of strict notions of territoriality which may determine the propriety of a forum's assertion of personal jurisdiction, including "the plaintiff's interest in obtaining convenient and effective relief . . .; the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies." 444 U.S. at 292. As will be more fully discussed below, these three considerations lie at the very heart of the policy favoring nationwide certification of consumer class actions.

B. The Function Served By The "Minimum Contacts" Test Is Inapplicable To Plaintiff Class Actions.

The "minimum contacts" standard sought to be applied by petitioner to the members of a plaintiff class was developed to assure that the maintenance of a lawsuit "does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Thus, "minimum contacts" are required to protect a defendant "against the burdens of litigating in a distant or inconvenient forum." *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 292 (1980). As the Illinois Supreme Court has ruled, this consideration is inapplicable to class actions.

In contrast to an individual defendant, who must choose between incurring considerable expense and inconvenience if he appears in a distant forum, or judgment by default if he stays away, an adequately represented class member need not travel to the distant forum in order to ensure that his claim is effectively prosecuted. Note, *Multistate Plaintiff Class Actions: Jurisdiction and Certification*, 92 Harv.L.Rev. 718, 727 (1979). Because absent class members are not formal parties to the litigation, they are not subject to certain

ancillary risks. For example, the exposure of absent class members to individual counterclaims is subject to strict limitations. *See, e.g., Van Gemert v. Boeing Co.*, 590 F.2d 433, 440 n.15 (2d Cir. 1978), *aff'd* 444 U.S. 472 (1980). *National Super Spuds, Inc. v. New York Mercantile Exchange*, 75 F.R.D. 40 (S.D. N.Y. 1977); *Donson Stores, Inc. v. American Bakeries Co.*, 58 F.R.D. 485 (S.D. N.Y. 1973). (Of course, in the present case, petitioner has no counterclaim against any member of the plaintiff class.) Limitations are also placed on the rights of parties opposing the class to obtain discovery from absent class members. *See, e.g., Blackie v. Barrack*, 524 F.2d 891, 906-907 n.22 (9th Cir. 1975), *cert. denied*, 429 U.S. 816 (1976). Moreover, absent class members are not liable for costs and attorneys' fees in the event of a judgment adverse to the class. *See, e.g., Lamb v. United Security Life Co.*, 59 F.R.D. 44 (S.D. Iowa 1973); *Loves Wood Pit Barbecue v. Bell Brand Foods, Inc.*, 1974 Trade Cas. ¶74,905 (S.D. Cal. 1973).*

Petitioner inaccurately characterizes absentee class members as "non-consenting claimants" who are no different from "persons resisting claims." (Brf. for Pet. at 13). Petitioner's misconception, however, ignores the provisions of the Illinois class action statute, which requires adequate representation, and explicitly grants a class member the right to be excluded or "opt out" upon request. Ill.Rev.Stat. (1979) Ch.110, §§57.2(a)(3) and 57.5(b). Contrary to the contention of petitioner's *amici* (see, *e.g.*, Brf. of New England Legal Foundation at 21-23), this Court has not disregarded nor characterized the right to opt out as "bootstrapping in the extreme"

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* Illinois courts look to federal decisions under Rule 23, Fed.R.Civ.P., 28 U.S.C., for guidance in class action questions. *See, Steinberg v. Chicago Medical School*, 69 Ill.2d 320, 371 N.E.2d 634 (1977).

when considering *in personam* jurisdiction. *See, Underwriters National Assurance Co. v. North Carolina Life & Accident & Health Insurance Guaranty Association*, 50 U.S.L.W. 4319, 4324 n.20 (1982). *See also, Appleton Electric Co. v. Advance-United Expressways*, 494 F.2d 126, 140 (7th Cir. 1974) (holding that an option to withdraw and adequate representation of interests afford sufficient due process protection to nonresident class members).

There is also a fundamental distinction between the binding effect of an adverse judgment against a defendant and a judgment adverse to a plaintiff class. The binding effect of a judgment against a defendant is coercive in nature, necessarily depriving the defendant of a liberty or property right recognized by the Constitution and deemed protected by the Due Process Clause. The binding effect of a judgment entered against a plaintiff class is *res judicata*, and could, at worst, deny an individual member of the class "access to a court to relitigate a claim previously tried in a class suit in which that person was a member of the plaintiff class." *Developments in the Law—Class Action*, 89 Harv.L.Rev. 1318, 1404 (1976). Even then, the impact of *res judicata* would be felt only after the absentee had an opportunity for collateral attack in the court of his choice claiming that his interests were inadequately represented. Note, *Multistate Plaintiff Class Actions: Jurisdiction and Certification*, 92 Harv.L.Rev. 718, 727 (1979); Starrs, *The Consumer Class Action—Part II*, 49 B.U. L.Rev. 407, 441-43 (1969).

In this regard, the Brief of *Amicus Curiae* Public Citizen (Part II) sets forth a sound analysis of exactly what process is due an absentee class member. *Amicus* points out that under *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), and its progeny, three factors must be balanced to determine what process is due:

> "[F]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the added or substitute procedural requirements would entail."

While it is not necessary to burden the Court with a repetition of the thorough analysis offered by *Amicus*, respondent submits that a balance of these three factors, the private interest in a *claim* for $7.95; the risk of erroneous deprivation of the claim where there is adequate representation and no other forum in which the claim is being asserted; and the governmental interest in efficient and economical resolution of such claims, weighs strongly in favor of a finding that the Illinois Supreme Court did not violate the due process rights of the nonresident plaintiff class members.

Petitioner suggests a few instances in which the Court has applied traditional tests of *in personam* jurisdiction "to all types of parties." (Brf. for Pet. at 12). Not one of the cases cited, however, involved parties with any similarity to the posture of an absentee class member. In *Hanson v. Denkla*, 357 U.S. 235 (1958), the issue was whether a Delaware court was bound to enforce a judgment of a Florida court as to the validity of a Delaware trust. The jurisdictional issue emanated from the inability of the Florida court to exercise personal jurisdiction over a nonresident trustee who, under Florida law, was an indispensable party in an action over the validity of a trust. In both *Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1957) and *Estin v. Estin*, 334 U.S. 541 (1948), the Court addressed the failure of New York courts to recognize *ex parte* divorce decrees of Nevada courts insofar as

they constituted a bar to the wives' claims for support in New York. Because the wives in the Nevada cases would have been defendants in actions filed by their husbands (had these actions not originally been brought *ex parte*), it is difficult to ascertain how the role of these parties could be construed as similar to that of nonresident plaintiff class members. Finally, in *New York Life Ins. Co. v. Dunlevy*, 241 U.S. 518 (1916)* the interpleader claimant was in a direct adversary relationship with his fellow claimants and therefore, in contrast to an absentee class member, could not have had his claim represented vicariously.

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* The decision in *Dunlevy* led to the enactment of the first Federal Interpleader Act, 39 Stat. 929 (1917), within nine months of its announcement. See, Chafee, *The Federal Interpleader Act of 1936: I*, 45 Yale L.J. 963 (1936). In its current form, the Federal Interpleader statute bestows original jurisdiction on district courts over matters of state law involving amounts of as little as $500. 28 U.S.C. §1335.

Legislation had been proposed to authorize district courts to entertain litigation such as the present case in light of *Snyder v. Harris*, 394 U.S. 332 (1969), and its progeny, which effectively forecloses a federal forum for consumer class actions. *See, e.g.*, Citizens' Access to the Courts Bill of 1978, S. 2390, 95th Cong., 2d Sess., 124 Cong. Rec. S34 (daily ed. Jan. 19, 1978); Consumer Protection Bill of 1977, H.R. 6118, 95th Cong., 1st Sess., *Agency for Consumer Protection: Hearings Before a Subcomm. of the Comm. on Government Operations, House of Representatives*, 95th Cong., 1st Sess. 2 (1977); *Hearings on S.3201 Before the Consumer Subcommittee on Consumer Protection of the Senate Committee on the Judiciary*, 91st Cong., 2d Sess. 81 (1977). Such a legislative expansion of the rising federal caseload is unnecessary, however, in light of the Court's recognition that such suits "can often be most appropriately tried in state courts." 394 U.S. at 341. The instant case is a case in point.

C. Inclusion Of Non-Illinois Residents In A Plaintiff Class Action Brought In An Illinois Court Would Not Offend Principles Of State Sovereignty.

Petitioner contends that the Illinois Supreme Court disregarded the principles of state sovereignty, "which are included within the Due Process Clause 'acting as an instrument of interstate federalism.'" (Pet. Brf. at 16, citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294 (1980)). However, as this Court has most recently stated:

> "The restriction on state sovereign power described in *World-Wide Volkswagen Corp.*, . . . must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. That clause is the only source of the personal jurisdiction requirement and the clause itself makes no mention of federalism concerns." *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinea*, 50 U.S. L.W. 4553, 4556 n.10 (1982).

Thus, the personal jurisdiction requirement "represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty." 50 U.S. L.W. at 4556.

With its holding in *Insurance Corp. of Ireland, Ltd.*, this Court has recognized that there is no provision of state sovereignty in the Due Process Clause which would impose a limitation on the authority of a State to assert personal jurisdiction. In *Nevada v. Hall*, 440 U.S. 410 (1979), this Court held that there is no principle of state sovereignty which would limit a State's *in personam* jurisdiction implicit anywhere else in the Constitution. In that case the Court held that one State may constitutionally assert jurisdiction over another State in a suit brought by a private individual. The Court rejected Nevada's argument that the Constitution "implicitly" gives rise to a doctrine of state sovereignty that

would deny a State jurisdiction to resolve an individual's claim against another State. 440 U.S. at 424-425. Rejecting Nevada's reliance on various constitutional provisions relevant to interstate sovereignty, the Court reasoned that "the existence of express limitations on state sovereignty may . . . imply that caution should be exercised before concluding that unstated limitations on state power were intended by the Framers." 440 U.S. at 425. The reasoning in *Hall* is particularly responsive to petitioner's fear of "encroachments on state judicial power that are inconsistent with our federal system of government" (Brf. for Pet. at 16):

> "The Court's logic in *Hall* and its rejection of an implicit doctrine of interstate sovereignty would seem to apply a fortiori to the issue of personal jurisdiction. For what could cause greater interstate friction, or constitute a more serious invasion of a state's sovereignty, than the subjection of one state to suit in the courts of another state? Surely, allowing a state to assert jurisdiction—without necessarily applying its own law—to a controversy involving private individuals and having stronger connections to another state does not present as great a threat to the interests of federalism." Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 N.U. L.Rev. 1112, 1132 (1981).

Inherent in petitioner's "federalism" argument is the unfounded presumption that the lower court's opinion would somehow usurp the sister States of their "sovereign power to try causes in their own courts." (Brf. for Pet. at 17). This presumption, however, ignores many of the realities of class action litigation, including the availability of the right to opt out or, in the event of inadequate representation, to collaterally attack. Moreover, the mere pendency of a nationwide class action, even a certified nationwide class action, does not pre-

clude a court of a sister State from entertaining an action on the same claim. On the reverse side of the coin, as more fully discussed below, in certifying a plaintiff class an Illinois trial judge is statutorily required to determine whether a class action would be "an appropriate method for the fair and efficient adjudication of the controversy" (Ill.Rev.Stat. (1979) Ch.110, §57.2(a)(4)), and would certainly consider the pendency of parallel actions prior to certifying a nationwide class. The trial judge also has the power to stay litigation or adjudication or deny certification as to those members of the plaintiff class whose claims are represented elsewhere. Thus, in the words of Justice White, petitioner is "attempting to create a logical conundrum out of a fairly straightforward matter." *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinea*, 50 U.S. L.W. 4553, 4554 (1982).

Petitioner's position also mistakenly presumes that Illinois has no interest in maintaining a nationwide class. (Brf. for Pet. at 23-24). Illinois is the only State in the Union in which a citizen came forward to challenge the nationwide conduct of petitioner. Even petitioner concedes that Illinois has an interest in protecting its own residents. Inherent in this interest is the ability of the State to provide its citizens with a viable avenue of legal redress. The availability of a nationwide class greatly enhances the legal position of an Illinois citizen in a number of ways, including the reduction of the costs of litigation in relation to the potential recovery to the class and the individual Illinois class member and the ability to attract competent legal counsel to a case which otherwise may not economically warrant a significant expenditure of time or contingent risk. Indeed, this Court has recognized that "class actions . . . may enhance the efficacy of private actions by permitting citizens to combine their limited resources to achieve a

more powerful litigation posture." *Hawaii v. Standard Oil Company of California*, 405 U.S. 251, 266 (1972).

Illinois has an interest in policing business conducted within its borders, particularly when nationwide wrongful conduct may not be remedied by overburdened federal agencies. *Cf., Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 339 (1980) (the "classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government"). Historically, such interests have been viewed as a substantial consideration in questions of *in personam* jurisdiction. *See, e.g., Hess v. Pawloski*, 274 U.S. 352 (1927) (holding that because of a State's interest in promoting care on its highways, a nonresident motorist can be found to defend in the State of the situs of an accident despite the jurisdictional requirement of presence in the forum state). Illinois also has an interest in deterring harmful practices sometimes employed by manufacturers and retailers of consumer goods. Comment, *Expanding the Impact of State Court Class Action Adjudications to Provide an Effective Forum for Consumers*, 18 U.C.L.A. L.Rev. 1002, 1021-22 (1977). It would therefore be naive to assume that Illinois has no interest in providing its citizens with the most powerful vehicle possible to advance social policies it shares with each of its sister States.* The lower court realized, as did Justice Cardozo in *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935), that the Constitution "was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."

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* *See*, Brief of *Amicus Curiae* Attorney General of the State of Illinois.

III.

PETITIONER'S CONJECTURE THAT THE LOWER COURT'S RULING MAY DISRUPT THE ORDERLY ADMINISTRATION OF THE LAWS OF SISTER STATES IGNORES THE FLEXIBILITY AND PURPOSE OF THE CLASS DEVICE.

Petitioner sets forth a "list of horrors" which it assures this Court will befall the interstate system of justice in future cases if the lower court's ruling is allowed to stand. Petitioner contends that intrinsic to a nationwide class is the likelihood of improperly applying or interpreting the laws of other states; an upsurge of forum shopping and collusive suits; the possibility of races to the courthouse or parallel nationwide class actions in sister States; and an increased burden on a state court which undertakes resolution of a nationwide class action. (Brf. for Pet. at 19-24). However, at least since 1853, when this Court decided *Smith v. Swormstedt*, 57 U.S. (16 How.) 288 (1853), nationwide class actions brought on the basis of state law, both in federal*

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* For the 12-month period ending June 30, 1980, 111 diversity class actions were filed. *Administrative Office of the United States Courts, 1980 Annual Report of the Director*, A-170, Table X-5 (1980). For the 12-month period ending June 30, 1981, 119 diversity class actions were filed. *Administrative Office of the United States Courts, 1981 Annual Report of the Director*, A-190, Table X-5 (1981).

Actions brought in district court on the basis of diversity of citizenship have no greater constitutional basis than those brought in state court, for in the absence of a federal rule or statute establishing a federal basis for the assertion of personal jurisdiction, a district court's *in personam* jurisdiction is no greater than that of the courts of its forum state. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinea*, 50 U.S.L.W. 4553, 4558 (1982) (Powell, J., concurring).

In a footnote, petitioner contends that nationwide class actions in federal courts are no precedent for such actions in state courts "because, *at least in non-diversity cases*, the Constitu-

(Footnote continued on following page)

and state courts, have been commonplace, with no reported decision hinting at the purported destructive force of such actions. In this regard, respondent strongly agrees with the sentiments expressed by one authority on class action procedure:

> "To reveal my own biases, I believe that the class action and other nascent forms of group litigation hold considerable promise for redressing injuries to large numbers of citizens who individually would not have the economic and logistical capacity to litigate. I am convinced that any of the alleged deficiencies of the class action have been overstated." Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 Harv.L.Rev. 664, 665 n.3 (1979).

A. Proper Exercise Of A Trial Court's Discretion And The Flexibility Of The Class Device Will Alleviate The Procedural Asperities Suggested By Petitioner.

Lying at the heart of petitioner's anxiety over the possibilities of forum shopping, collusive suits, races to the courthouse, and parallel class actions is the failure to recognize that when certifying and managing a class action, "[i]nstead of wielding a meat axe, courts increasingly are operating with a scalpel." 92 Harv.L.Rev. at 680. No order of class certification is set in stone. If sub-

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footnote continued

tion does not impose territorial jurisdictional limitations on federal courts of the same nature as those imposed on the States . . ." (Brf. for Pet. at 15, emphasis added). With this assertion, petitioner apparently wishes to evade the fact that federal courts have routinely entertained nationwide class actions in diversity cases, and in cases in which claims based on state law were pendent to a federal claim, without the breakdown of the federal system predicted by petitioner.

sequent events arise in class litigation, such as the development of antagonistic interests between the class representative and certain members of the plaintiff class, the trial court is free to modify the certification order. *General Telephone Company of the Southwest v. Falcon*, 50 U.S.L.W. 4638, 4641 (1982). In certain cases, modification of an order certifying a nationwide class may be appropriate if the interests of some class members are being better represented elsewhere. (See, *ante*). Of course, an Illinois state trial judge,* like a district judge, must consider the existence of a parallel class action when deciding whether to certify the later suit as a nationwide class action, and will, when fashioning a certification order, exclude those whose interests cannot be represented by the class representative. *Compare* Rule 23(b)(3), Fed.R.Civ.P., 28 U.S.C., *with* Ill.Rev.Stat. (1979) Ch.110, §57.2(a)(4). The appropriateness of nationwide class certification will also be considered where certification is shown to be sought primarily for the purpose of forum shopping, vexatious harassment or un-

* Underlying petitioner's argument with regard to the due process implications of a state court's ability to manage a nationwide class action and to prevent its abuse, is the premise that a state court is intrinsically ill-equipped to control such litigation. (See, *e.g.*, Brf. for Pet. at 19, 21 and 22). This premise is unfounded, for, as the Chief Justice has succinctly expressed, "I hope we will never become so bigoted as to think that state judges are any less devoted to the principles of the federal constitution than other judges and lawyers." Burger, *Deferred Maintenance of Judicial Machinery*, 54 Judicature 410, 413 (1971); *see also, Sumner v. Mata*, 449 U.S. 539, 549 (1981); O'Connor, *Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge*, 22 Wm. & Mary L.Rev. 801, 812-814 (1981); Burger, *Annual Report on the State of the Judiciary*, 62 A.B.A. J. 443, 444 (1976) (". . . [N]onfederal cases must be decided under state laws and can best be handled by state judges. They are at least as familiar with that law as federal judges.")

warranted attorneys' fees. See generally Comment, *Parallel State and Federal Court Class Actions*, 12 Loyola U.L.J. 277 (1981).

In summary, it is the flexibility which "enhances the usefulness of the class-action device," *General Telephone Company of the Southwest v. Falcon*, 50 U.S.L.W. 4638, 4641 (1982), that not only alleviates the fanciful concern of petitioner, but makes nationwide certification in cases like this superior to any of the more expensive, burdensome, or ineffective alternatives. Accordingly, this Court should once again "decline to adopt the extreme position that [a nationwide] class may never be certified," *Califano v. Yamasaki*, 442 U.S. 682, 702-03 (1979), on the basis of total conjecture.

B. Because The Several States Share The Same Interest In Furthering Fundamental Substantive Social Policies, There Is No Danger That The Laws Of The States Will Be Improperly Applied.

At the outset, it is entirely inappropriate and premature to presume that the Illinois trial court will "nullify the policies of other States" in its application of law to the facts of this case before the court has even had the opportunity to determine what law or laws are to be applied. Even assuming *arguendo* a significant divergence between the policies of certain States and those of Illinois, there is again no reason why the trial court cannot consider that fact in defining the class it certifies—indeed no reason to throw out the remedial baby with the choice-of-law bathwater.

Nevertheless, in the context of a nationwide class action, a state trial court is capable of identifying and accommodating the interests of sister States, particularly where there are few, if any, "real" or "true" rather than "apparent" conflicts between the pertinent laws of

the various States. While petitioner may claim some insignificant divergence between certain elements of the common law contract or statutory consumer fraud laws among certain States, petitioner has been unable to show any State in which, as a matter of policy, a class member will be unable to recover under one or both legal theories advanced by respondent, much less any divergence in substantive policies that would exclude *all* nonresidents from the plaintiff class. In other words, petitioner cannot show that *all* other States have a strong interest in applying their own *policies*, which differ substantially from the policy of Illinois. See generally Kay, *The Use of Comparative Impairment to Resolve True Conflicts: An Evaluation of the California Experience*, 68 Cal.L.Rev. 577 (1980). Indeed, with regard to the substantive legal claims in the instant case, it is apparent that each of the fifty States share identical policies.*

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* For the Court's convenience, respondent attaches in the Appendix a survey recently conducted by the National Institute of Justice of the United States Department of Justice, delineating the characteristics of the Unfair and Deceptive Acts and Practices statutes of each of the fifty States. National Institute of Justice of the U.S. Department of Justice, *Policy Briefs: Action Guides for Legislators and Government Executives: Consumer Fraud*, 22-23 (1982). On the basis of its survey and legal research, the National Institute concluded:

> "From the 1950s through 1981, *all* states enacted Unfair and Deceptive Acts and Practices (UDAP) statutes. *Two legislative policies are reflected in these statutes*:
>
> •*deterence*: to prevent unfair, deceptive, and unconscionable practices by eliminating monetary incentive for merchants to engage in such activity, and in some states to apply criminal sanctions; and
>
> •*compensation*: to provide strong and effective remedies, both public and private, to assure that consumers will recover any damages caused by abusive acts." *Id.*, at 1 (emphasis added).

Moreover, it does not follow that by certifying a plaintiff class which includes residents of 50 other States, an Illinois court is constitutionally or legally precluded from applying the law of one State which arguably has more contacts* with the controversy than Illinois, to the claims of all class members. For example, when faced with a nationwide class action brought under a breach of contract theory in *Schlosser v. Allis-Chalmers Corp.*, 86 Wis. 2d 226, 271 N.W.2d 879 (1978), the Supreme Court of Wisconsin applied a "grouping of contacts" approach to determine which State's law would best serve to resolve the contracts issue. There is little reason why that or a similar approach, after a hearing on the relevant facts, cannot be utilized to apply the appropriate law, whether it be the law of Massachusetts, where petitioner is headquartered and the subject promotion was planned and executed; Delaware, where petitioner is incorporated; Minnesota, where the class members' responses were handled and processed; Illinois, where a class member came forward to challenge petitioner's nationwide conduct; or any other State which the evidence may show has contacts with the controversy.**

Accordingly, premature and conjectural bugabooes regarding the application of law should not be permitted to override the utility of a nationwide class action.

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* The term "contacts" differs in meaning in the context of choice-of-law determinations as opposed to determinations of *in personam* jurisdiction. "The Court has recognized that examination of a State's contacts may result in divergent conclusions for jurisdiction and choice-of-law purposes." *Allstate Insurance Co. v. Hague*, 449 U.S. 302, 317 n.23 (1981).

** Illinois courts will "not refuse to apply the law of a foreign state, however unlike its own, unless it is contrary to pure morals or abstract justice, or unless the enforcement would be of evil example and harmful to its own people." *Champagnie v. W.E. O'Neil Const. Co.*, 77 Ill. App.3d 136, 395 N.E.2d 990, 992 (1979).

The basic operation of a nationwide class action, like any class action, "ultimately depends on the ingenuity of . . . judges working cooperatively with counsel to engineer the management of complicated lawsuits." Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 Harv.L.Rev. 664, 667 (1979).

C. The Necessity Of A Viable Forum For Efficient Resolution Of Consumer Claims Favors Certification Of An Appropriate Nationwide Class.

Even the most ardent critics of class actions do not seriously contend that its alternatives, individual suits or governmental action, have been as effective as the class action in controlling consumer frauds and providing redress to the injured consumer. *Hoover v. May Department Stores Co.*, 62 Ill.App.3d 106, 112, 378 N.E. 2d 762, 768 (1978), *rev'd on other grounds*, 77 Ill.2d 93, 395 N.E.2d 541 (1979).* Nevertheless, since *Snyder v. Harris*, 394 U.S. 332 (1969), and its progeny, the typically small-claim consumer class action has been divested of a federal forum. The Court made clear, however, that neither the Court nor Congress intended to deprive classes of small claimants access to a viable forum, but to "check, to some degree, the rising caseload of the federal courts." 394 U.S. at 339-340. Thus, the Court noted:

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* On this subject the National Institute of Justice concluded that: "As a complementary function to state enforcement efforts, private litigation offers a powerful means for deterring consumer fraud and redressing the wrong done to individual consumers," particularly class actions, which "permit recovery by a large number of victims while minimizing individual efforts." National Institute of Justice of the U.S. Department of Justice, *Policy Briefs: Action Guides for Legislators and Government Executives: Consumer Fraud*, 4 (1982).

> "[B]y successively raising the jurisdictional amount, Congress had determined that cases involving lesser amounts should be left to be dealt with by the state courts. . . . Suits involving issues of state law and brought on the basis of diversity of citizenship can often be most appropriately tried in state courts." 394 U.S. at 340-41.

To emphasize this point, the Court cited *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921), in which the Court allowed a class action brought in federal court on behalf of persons who "resided in many different States of the Union," and held that the judgment rendered therein was binding on all members. The Court noted: "That a class suit of this nature might have been maintained in a state court, and would have been binding on all of the class, *we can have no doubt*." 255 U.S. at 366 (emphasis added).

Despite the recognition that State courts provide an ideal, if not the only, forum for actions such as the present case, petitioner argues that theoretical "difficulties in administering a nationwide class action . . . impose burdens on the court as great as, and in some respects in excess of, those that would be incurred in separate class actions in individual States." (Brf. for Pet. at 25). Ignoring for the moment the fact that this concern is exclusively within the province of the lower court,* the

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* Petitioner's extension of the "minimum contacts" standard to class determinations would, in itself, place such a burden on a state court as to effectively hobble purely *intra*state class actions. If petitioner's position is accepted, parties to a class action will be impelled to litigate the factual issue of "contacts" as to each prospective individual class member. In the present case, for example, a resident of Indiana who had performed his end of the promotion in Illinois would certainly have "minimum contacts" with Illinois for the purpose of this lawsuit, but, because he requested that his Accent lighter be

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most appropriate response to this contention comes from one commentator who hypothesized the thought process of a district judge faced with a motion to certify a class in a massive antitrust case:

> "'Which do I think is better, allowing [the plaintiff's] class action on behalf of millions of people in a case so complicated . . . that I am not likely to be relieved of it for eight or twelve years, or denying certification and forcing individual actions to be brought, knowing that none of the class members have enough at stake to ever show up at the courthouse?' . . .
>
> "*As you might suspect, I think this line of thought is unfortunate.* It misses the mark in terms of what the draftsmen meant by superiority, particularly their clear intention that the class action be available to assist small claimants in securing redress of their grievances." Miller, *An Overview of Federal Class Actions: Past, Present and Future*, 4 Just. Sys.J. 197, 213 (1978) (emphasis added).

The Illinois Supreme Court considered the burden it was imposing on the Illinois court system in allowing the trial court to maintain this relatively straightforward and eminently feasible and manageable class action. The court also realized the duty it was undertaking, for, as Professor Hazard once wrote: "A state court

---

footnote continued

mailed to his Indiana address, would be excluded from the class. A corporation that does business in Illinois but is incorporated and headquartered elsewhere, may have contacts with Illinois but will be excluded from the class. An individual who has moved to Illinois since the cause of action against petitioner accrued, will be excluded from the class despite actual *presence* in the forum State. Thus, absent an individual determination of the "contacts" of each of the 179,580 persons who were allegedly bilked by petitioner, the trial court risks denying equal protection of the law to a number of persons whose claims are excluded on the basis of petitioner's motion to dismiss. U.S. Constitution, Amendment XIV.

system of remedial justice that is actually effective is a legitimate objective to which each state may *pro tanto* make contribution." Hazard, *A General Theory of State-Court Jurisdiction*, 1965 Sup.Ct.Rev. 241, 282 n.147.

CONCLUSION

For the reasons stated, the petition should be dismissed for want of a federal question or, in the alternative, the judgment of the Illinois Supreme Court should be affirmed.

Respectfully submitted,

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APPENDIX

A. STATE UDAP STATUTE CHARACTERISTICS CHART
(all numbers in thousands of dollars)

	ALA	ALAS	ARIZ	ARK	CALIF	CALIF	COL	CONN	DEL	DC	FLA	GA	HAW	IDAHO	ILL	IND	IOWA	KAN	KY	LA	MAINE	MD	MASS	MICH	MINN	MISS
PROHIBITIONS																										
False, fraudulent			•	•		•			•						•		•	•	•						•	
Misleading, deceptive	•		•	•		•	•		•							•	•	•	•						•	
Unfair, deceptive acts		•			•	•		•	•	•	•	•	•	•	•				•	•	•	•	•	•		•
Unconscionable										•									•					•		
Itemized practices	•	•		•	•	•	•		•	•		•	•	•	•	•	•	•				•		•	•	•
EXCEPTIONS																										
Publishers, printers	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•		•	•	•	•		•		•	•	•
Regulated, allowed by law	•	•	•	•				•	•	•	•	•		•	•	•	•				•		•	•		
Other	•	•			•				•	•	•		•	•	•					•	•	•	•	•	•	•
PRIVATE REMEDIES																										
Damages	•	•	a		•	b	•	•	•	•	•	•	•	•	•	•		•	•	•	•	•	•	•	•	•
Multiple damages	•	•							•	•		•	•							•			•			
Punitive damages					•			•		•		•		•												
Statutory damages	.1	.2											1	.5				.2					100	25		
Attorney's fees	•	•					•	•	•	•	•	•	•	•	•	•		•	•	•	•		•	•	•	•
Rescission														•		•										
Injunction	•	•			•	•		•	•		•	•	•					•				•		•	•	
Other		•			•			•		•				•	•				•			•		•	•	
Class Action		•			•	•		•								•		•						•	•	
PUBLIC REMEDIES																										
Cease and desist injunction	•	•	•	•		•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•
Cease and desist violation	25	25	10	10		6	10	25		1	5	22	10	10		15		10	25	5	10		10	5		5
Criminal	•	•		•		•							•		•	•						•				
Civil Penalty		5	5	10		2.5		2		1		2	10		50			2	2			c		25	25	5
Restitution	•	•	•	•		•	•	•	•	•	•	•	•	•	•		•	•	•	•	•	•	•	•	•	•
Receiver	•		•			•		•	•		•	•			•		•	•	•			•		•		•
License revocation	•			•				•				•		•	•		•	•				•	•	•		•
Costs	•		•	•						•		•			•		•	•			•	•		•		
Other	•		•			•	•		•	•	•	•			•		•	•				•		•		
ADMINISTRATIVE POWERS																										
Rulemaking		•	•				•	•	•	•	•	•	•	•	•		•	•		•	•	•	•	•	•	
Subpoena	•	•	•				•	•	•	•	•	•		•	•		•	•	•	•		•			•	•
Civil investigative demand		•	•	•			•		•			•	•	•	•		•	•	•	•	•		•			•
Administrative hearing		‡	‡				‡	†	†	†	†	‡		‡			‡	*	‡			‡				
AGENCY																										
Attorney General	•	•	•	•		•	•	•	•		•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•
Local enforcement	•					•	•	∮			•	∮	∮	∮				•	∮	•				•	•	•
Special agency						•		•	•	•		•	•						•	•		·			•	

SOURCE: This chart, which appeared in the Survey of Consumer Fraud Law[4], was updated based on state statutes made available during July 1980-January 1981, except for the Alabama statute which was passed in April 1981.

KEY

† = Conduct hearings in conjunction with agency's power to issue cease and desist orders

‡ = Conduct hearings in aid of any investigation or inquiry

* = Conduct public hearings

∮ = Local enforcement agencies to assist the attorney general

A. STATE UDAP STATUTE CHARACTERISTICS CHART (continued)
(all numbers in thousands of dollars)

	MO	MONT	NEB	NEV	NH	NJ	NM	NY	N.CAR	N.DAK	OHIO	OKLA	ORE	PA	RI	S.CAR	S.DAK	TENN	TEXAS	UTAH	VT	VA	WASH	W.VA	WIS	WYO
PROHIBITIONS																										
False, fraudulent	•					◦				•		•										•		•		
Misleading, deceptive	•		•	•		•		◦		•			•				•		•	•		•				•
Unfair, deceptive acts		•			•		◦		•		•		•	•	•	•		•			•		•	•	•	
Unconscionable			•			•	•	•			•	•	•							•	•				•	
Itemized practices			•	•	•	•	•		•		•	•	•	•	•	•	•	•	•	•	•	•		•		•
EXCEPTIONS																										
Publishers, printers	•	•	•	•	•	•	•	•	•	•	•	•	•	•		•	•	•	•	•	•	•		•		•
Regulated, allowed by law				•	•		•	•			•	•	•		•	•	•	•	•			•	•			•
Other	•	•	•	•	•				•		•	•						•		•		•			•	
PRIVATE REMEDIES																										
Damages	•	•	•		•	•		•	•		•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•
Multiple damages		•				•		•	•		•			•		•		•	•		•		•		•	
Punitive damages	•												•		•											
Statutory damages		.2			.1			.05		.3	f	.2	.1	.2						.1		.1		.2		
Attorney's fees	•	•	•		•	•	•	•	•		•	•	•		•	•		•	•	•	•	•	•		•	•
Rescission			•								•										•					
Injunction	•		•		•		•	•			•				•			•	•	•			•			
Other	•	•	•			•					•		•	•	•					•				•		
Class Action	•				•						•				•						•					•
PUBLIC REMEDIES																										
Cease and desist injunction	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	◦	•	•	•	•	h	•	
Cease and desist violation	5	10	5	10		25			5		5	10	25	5	10	15	5	1	10		10	5	25		10	5
Criminal		•	•	•	•												•								•	
Civil Penalty		.5	2	2.5	10	d	5	.5	5		25		25	j		5	2		2		10	1	2	5		
Restitution	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•		•	
Receiver	•	•			•	•				•	•	•		•	•		•		•	•						
License revocation		•			•	•				•	g	•	•	•	•			•			•		•			
Costs	•		•		•	•				•	•	•	•	•							•	•	•			
Other	•		•	•	•	•				•	•	•	•							•	•					
ADMINISTRATIVE POWERS																										
Rulemaking		•	•	•	•	•	•			•	•		•	•	•	•	•			•	•			•	•	
Subpoena		•	•	•	•	•		•		•	•	•			•	•	•		,	•				•	•	
Civil investigative demand	•	•	•	•	•	•	•		•	•		•	•		•	•	•	•	•		•		•			
Administrative hearing		↑	↑	↑		↑↕				↕	•	↕			↕	↑	↑			•					↑	↑
AGENCY																										
Attorney General	•	•	•		•	•	•	•	•	•	•	•	•	•	•	•	•	•	•		•	•	•	•	•	•
Local enforcement		•	•	•			•		f			•	•	•		•	f		f		f	•				
Social agency		•		•							•									•					•	

KEY

↑ = Conduct hearings in conjunction with agency's power to issue cease and desist orders

↕ = Conduct hearings in aid of any investigation or inquiry

• = Conduct public hearings

f = Local enforcement agencies to assist the attorney general

EXPLANATORY NOTES FOR UDAP CHARACTERISTICS CHART

(1) CIV. CODE §1750 (2) BUS. & PROF. CODE §§321,17200,17500

[a]The right of an individual to bring an action under the UDAP statute is inferred by decision of the Supreme Court of Arizona, In Banc. *Sellinger v. Freeway Mobile Home Sales, Inc.*, 110 Ariz. 573, 521 P.2d 1119 (1974).[12]

[b]Private and class actions are available under CAL. BUS. & PROF. CODE §§321, 17200, and 17500 (the latter sections provide for damages, punitive damages, and recission by court decision: *United Farm Workers of America, AFL-CIO v. Superior Court*, 47 Cal. App. 3d 334, 120 Cal. Rptr. 904 [1975].); CAL CODE §1750; and under other California laws, such as the *Consumer Legal Remedies Act*, and the *Song-Beverly Consumer Warranty Act*, *Id.*, §1791; fradulent practices are a basis for recission and damages in CIV. CODE §§1572, 1689, and 1710.[13]

[c]First violation of the title subjects defendant to a maximum civil penalty of $300 for each violation; defendant repeating the same violation is subject to fines in the amount of $500.

[d]First violation of the act subjects defendant to a maximum civil penalty of $2000, penalty for second and subsequent violations is $5000.

[e]N.Y. EXEC. LAW §63(12) prohibits the use of deception and unconscionable contract provisions; N.Y. GEN. BUS. LAW §349 prohibits the use of deceptive acts and practices; both statutes contain provision for restitution. Violation of the false advertising statute, N.Y. GEN. BUS. LAW §350, subjects defendant to civil penalties.[13]

[f]A civil penalty not to exceed $2000, recoverable only in an individual action, can be awarded if an act or practice is found to be unconscionable.

[g]Once a court has determined that a violation has occurred, the Attorney General may send a copy of the final judgment to the state agency that licenses or certified the defendant. The agency must investigate whether or not to revoke or suspend the defendant's license or permit.

[h]Restitution is authorized for violation of the false advertising statute, by §100.18(11)(d); and the right of an individual to bring an action for violation of an injunction issued under that statute is authorized by §100.18 (11)(b)(2). For violation of any general or special order issued under the UDAP statute, both private actions and restitution are available, by §§100.20(5) and 100.20(6).[13] The violation of any special order or rule subjects defendant to civil penalties of $100–10,000 for §100.20 and $25–200 for §100.18.

Petitioner's Reply Brief

Office - Supreme Court, U.S.
FILED
OCT 22 1982
STEVAS,
CLERK

No. 81-1493

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

THE GILLETTE COMPANY,

Petitioner,

v.

STEVEN MINER,

Respondent.

On Writ of Certiorari To
The Supreme Court of The State of Illinois

REPLY BRIEF FOR THE PETITIONER

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No. 81-1493

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

THE GILLETTE COMPANY,

Petitioner,

v.

STEVEN MINER,

Respondent.

REPLY BRIEF FOR THE PETITIONER

Petitioner The Gillette Company ("Gillette")[1] replies to the brief on the merits filed herein by respondent ("Resp. Brf.") and to the briefs *amicus curiae* in support of respondent filed by Consumer Coalition ("Cons. Coal. Brf."), Public Citizen ("Pub. Citizen Brf."), and Tyrone C. Fahner, et al. ("Fahner Brf."), as follows:

I. RESPONDENT AND RESPONDENT'S SUPPORTING *AMICI* IGNORE THE PRINCIPLES OF FEDERALISM UNDERLYING THE CONSTITUTIONAL LIMITATIONS ON STATE COURT JURISDICTION

The briefs of respondent and respondent's supporting *amici* uniformly approach the jurisdiction issue in this case as if state lines were irrelevant. They seek to justify this

[1] Petitioner's statement pursuant to Supreme Court Rule 28.1 is set forth at page A33 of the Petition for Certiorari.

erroneous approach by citing (see Resp. Brf., p. 21) this Court's recent decision in *Insurance Corp. of Ireland, Ltd.* v. *Compagnie des Bauxites de Guinea*, ____ U.S. ____, 72 L Ed2d 492 (1982), despite the Court's assurance in that case that its holding "does not alter the requirement that there be 'minimum contacts' between the nonresident defendant and the forum State" (72 L Ed2d at 501, n. 10). Respondent and *amici* also ignore the Court's citation in *Insurance Corp. of Ireland* of the statement in *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 292 (1980), that States may not "reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system" and its reaffirmation of that restriction as "a function of the individual liberty interest preserved by the Due Process Clause" (72 L Ed2d at 501, n. 10).

The issue presented by *Insurance Corp. of Ireland* was whether a party who had appeared in a case to contest personal jurisdiction could make a "constructive waiver" of the defense by failing to comply with discovery orders. In concluding that he could, this Court did not in any way depart from its prior decisions defining the limits on state court personal jurisdiction but merely clarified that those limits, unlike limitations on subject matter jurisdiction, are imposed by the Due Process Clause to recognize and protect an individual liberty interest and therefore may be waived by an individual. Because a meaningful protection of the individual liberty interest of litigants requires a recognition of federalism concerns, those federalism concerns remain an important determinant of state court jurisdiction.

The individual liberty interest served by the federalism component of traditional limitations on state court jurisdiction is a litigant's interest in having disputes involving his property rights decided by a local forum, subject to the political control of those whom its decisions affect, applying a body of law developed to serve their needs, and applying

it correctly. Over one hundred years of decisions of this Court have recognized this interest as a right secured by the Due Process Clause of the Fourteenth Amendment. For reasons described at length in petitioner's prior brief (Pet. Brf., pp. 16-26[2]), the decision below permits a gross invasion of this right without any justification. Although an individual may waive this right by consent, estoppel, or "contacts" with another State and subject himself to a forum that does not meet all these requirements, such a waiver always has been held to require affirmative conduct by the individual of a type that is totally absent with respect to nonresident class members here. *Insurance Corp. of Ireland*, in which the nonresident had voluntarily submitted to the jurisdiction of the court for the purpose of challenging jurisdiction, did not overrule the dozens of decisions of this Court recognizing this right, and it is no authority for ignoring the concerns of federalism in this case.

II. THE GROUNDS RELIED UPON BY RESPONDENT AND RESPONDENT'S SUPPORTING *AMICI* ARE INSUFFICIENT TO EXEMPT THIS CLASS ACTION FROM TRADITIONAL LIMITATIONS ON STATE COURT JURISDICTION

Respondent and respondent's supporting *amici* assert that failure of the court below to require minimum contacts or affirmative consent as a prerequisite to jurisdiction over nonresident class members is justified by (a) prior decisions of this Court purportedly exempting class actions from such requirements, (b) the procedural rules applicable to this class action, and (c) purported compliance with procedural due process standards developed by this

[2] As in *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 293-294 (1980), the references to "state sovereignty" in petitioner's prior brief include the collective individual rights of citizens of a State to have their disputes adjudicated by the courts of that State.

Court in right-to-hearing cases. These assertions should be rejected for the following reasons:

A. Prior Decisions of This Court Do Not Exempt Class Actions From Traditional Limitations On State Court Jurisdiction

Respondent and *amici* Consumer Coalition and Tyrone C. Fahner, et al., contend that the inapplicability of traditional limitations on state court jurisdiction to class actions is established by a series of decisions of this Court including *Hartford Life Insurance Co.* v. *Ibs*, 237 U.S. 662 (1915), and *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), in which state court adjudication of claims of non-resident class members was approved.[3] *Amicus* Consumer Coalition argues that because such cases, most of which preceded this Court's decision in *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), did not apply the strict territorial jurisdiction test of *Pennoyer* v. *Neff*, 95 U.S. 714 (1877), they therefore recognize that class actions constitute an exception to the traditional limitations on state court jurisdiction.

In the *Ibs* case, however, the Court clearly addressed the jurisdiction issue and found jurisdiction to exist because the forum State was "where the Company was chartered

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[3] Other cases cited are *Sovereign Camp of the Woodmen of the World* v. *Bolin*, 305 U.S. 66 (1938); *Hartford Life Insurance Co.* v. *Barber*, 245 U.S. 146 (1917); *Supreme Council of the Royal Arcanum* v. *Green*, 237 U.S. 531 (1915); and *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U.S. 356 (1921). Respondent and *amici* also cite *Hansberry* v. *Lee*, 311 U.S. 32 (1940), ignoring both the fact that no issue of state court jurisdiction over non-residents was there presented, the land in question and the parties all being located in Illinois, and the observation by the Court in that case that considerations favoring class actions, which it discussed in *dicta*, are not the same as those determining whether the class action procedure "satisfies the requirements of due process" (311 U.S. at 42). See Pet. Brf., pp. 9-11.

and where the Fund was maintained" (237 U.S. at 671). The same was true in *Mullane*, where jurisdiction was established by the presence of trusts created in and regulated by the forum State (339 U.S. at 311-313). The other cases, by their citation of *Ibs*, follow the same approach. To the extent the jurisdictional inquiry in these cases (the earliest of which was decided 37 years after *Pennoyer*) arguably departs from the strict territorial analysis of *Pennoyer*, the cases are similar to a number of other decisions of the same period in which the modern standards of state court jurisdiction were gradually being developed. See, e.g., *International Harvester Co.* v. *Commonwealth of Kentucky*, 234 U.S. 579 (1914); *Hess* v. *Pawloski*, 274 U.S. 352 (1927).

All of the cases relied upon by respondent and *amici* involved the adjudication of rights in property or in an organization which had its *situs* in the forum State. In all cases the class members could clearly have foreseen when they entered the transactions in question that the matters in controversy would be adjudicated in the forum State. All the cases are thus fully consistent with the flexible "minimum contacts" standard of *International Shoe*. See *Shaffer* v. *Heitner*, 433 U.S. 186, 207-209 (1977). The suggestion of *amicus* Consumer Coalition to the contrary (Cons. Coal. Brf., pp. 11-12) is simply incorrect.[4] As *amicus*

[4] *Amicus* Consumer Coalition is also in error in asserting the existence of a "long-standing rule that class actions are not governed by the jurisdictional rules applied to individual actions" in state and lower federal courts (Cons. Coal. Brf., p. 4 and Appendix A). In the decisions cited by *amicus* in support of this assertion in which multistate classes were actually allowed, the "minimum contacts" rule was satisfied or inapplicable because federal claims were presented in federal courts. In the few decisions in which this was even arguably not the case (all of which are from Illinois, Kansas, and Wisconsin), the "minimum contacts" rule was overlooked or erroneously held to be inapplicable.

Public Citizen concedes, these cases are readily distinguishable from the present case "because they involve plaintiff classes with a direct connection with the forum State" (Pub. Citizen Brf., p. 10).

Furthermore, all the cited decisions of this Court involved class members who had legal relationships with each other and whose claims could not in fairness be adjudicated by inconsistent standards. Decisions upholding the adjudication of all such claims in a single forum are not a precedent for similar treatment of wholly independent claims that merely share some common issues of fact, such as are presented here.

Finally, respondent argues that because there need not be diversity of citizenship between plaintiff class members and a defendant in order to sustain federal diversity *subject matter* jurisdiction, plaintiff class members should be exempt from state court *personal* jurisdiction requirements (Resp. Brf., pp. 14-15). Recent decisions of the Court, however, do not consider class members as different from individual litigants for purposes of the amount in controversy requirement in diversity jurisdiction. *Snyder* v. *Harris*, 394 U.S. 332 (1969); *Zahn* v. *International Paper Co.*, 414 U.S. 291 (1973). And in any event, decisions as to the subject matter jurisdiction of federal courts involve the federal government's judicial power under Article III of the Constitution and are not concerned with relationships between a forum and the parties to an action or the distribution of judicial power among the States, and thus have no bearing on questions of personal jurisdiction.

B. The Class Action Procedures Applicable To This Case Do Not Justify An Exemption From Traditional Limitations On State Court Jurisdiction

Respondent argues that the class action procedures provided by the Illinois statute or which will be applied in the "proper exercise of a trial court's discretion" provide

sufficient protections to justify dispensing with "minimum contacts" or affirmative consent of nonresidents as a requirement for exercise of state court jurisdiction over nonresident class members (Resp. Brf. pp. 16-18, 22-23, 26-28).

Respondent relies upon the procedural provision of the Illinois class action statute permitting class members to "opt out" of the litigation (Resp. Brf., pp. 17-18). As explained in petitioner's prior brief, however, the failure to opt out is not equal to consent to jurisdiction or a waiver of a constitutional right (Pet. Brf., pp. 14-15). And a state court cannot impose a duty upon nonresidents without contacts with the State who have not appeared before it to take affirmative steps to avoid its jurisdiction. That would be inconsistent with the proposition recently reaffirmed by this Court in *Insurance Corp. of Ireland, Ltd.* v. *Compagnie des Bauxites de Guinea*, ____ U.S. ____, 72 L Ed2d 492, 504 (1982), that a nonresident "is always free to ignore the judicial proceedings" in a forum with which he has no contacts. An "opt out" procedure would not suffice to assert jurisdiction over a nonresident individual defendant, and it is equally insufficient with respect to nonresident class plaintiffs.

The *Insurance Corp. of Ireland* decision also strongly suggests that a nonresident may affirmatively consent to *in personam* jurisdiction in a State with which he has no contacts by "opting in" to a class action in that State. Since multistate class actions thus may proceed on that basis, there is no need to permit states to assert jurisdiction based solely upon a class member's failure to opt out.

The requirement of the Illinois statute that the named plaintiff be found to be an "adequate representative" of class members does not alleviate the concerns underlying the traditional limitations on state court jurisdiction.

Those limitations are not grounded upon a fear that a nonresident cannot obtain adequate representation before the courts of a distant State. The fact that other parties who were properly before the court had the same interest as a nonresident did not cause this Court to depart from the traditional test of jurisdiction as to the nonresident in cases such as *Hanson* v. *Denckla*, 357 U.S. 235 (1958), and *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286 (1980). It is obvious that personal jurisdiction over a nonresident individual defendant may not be created by a state court's appointment of an "adequate representative" for the defendant, (or, *a fortiori*, by approval of a self-selected representative whose own legal rights are governed by different law), and jurisdiction may not be created by such a procedure with respect to nonresident class plaintiffs.

Respondent's argument that traditional limitations on jurisdiction can be relaxed because of supposed "strict limitations" on the "ancillary risks" of litigation to which nonresident class members may be subjected (Resp. Brf., pp. 16-17) is not supported by any authority of the Illinois courts. Petitioner certainly does not agree that it may not seek discovery from class members or assert counterclaims against them or that any of its due process rights should be compromised. In any event, the due process limitations on state court jurisdiction do not exist merely to protect nonresidents from "ancillary risks" of litigation.

Finally, respondent suggests that a judgment adverse to a plaintiff class is somehow less "coercive" than other adverse judgments (Resp. Brf., p. 18). A class action judgment denying a claim of a class member, however, has the same *res judicata* effect as an individual judgment denying a claim, as respondent concedes. *Id.* And a cause of action is clearly a property right protected by the Fourteenth Amendment. *Logan* v. *Zimmerman Brush Co.*,

___ U.S. ___, 71 L Ed2d 265, 273 (1982). An adverse class action judgment thus deprives a class member of property to the same extent as any other adverse judgment. But even if there were differences between a class action judgment and an individual judgment, they would provide no ground for exempting class actions from the state court jurisdiction requirements applicable to individual actions. Cf. *Shaffer* v. *Heitner*, 433 U.S. 186 (1977) (differences between *in rem* and *in personam* judgments do not justify departure from "minimum contacts" standard for the former).

C. Procedural Due Process Tests Utilized In Right-To-Hearing Cases Are Inapplicable Here And Do Not Exempt This Action From Traditional Limitations On State Court Jurisdiction

Respondent and *amicus* Public Citizen argue that because the constitutional issue in this case arises under the Due Process Clause of the Fourteenth Amendment, the decision ought to be governed by the principles applied by this Court in certain cases also involving that Clause (or its Fifth Amendment counterpart) dealing with when a governmental body must provide a hearing before depriving a person of property rights (Resp. Brf., pp. 18-19; Pub Citizen Brf., pp. 19-21). The case principally cited in this connection is *Mathews* v. *Eldridge*, 424 U.S. 319 (1976).

As previously noted, questions as to the limitations on state court jurisdiction, although arising under the Due Process Clause, involve concerns of federalism as well as matters such as convenience or fairness. *Mathews* v. *Eldridge* and the other cases cited by respondent and *amicus* do not deal with issues of state court jurisdiction, do not involve federalism concerns, and are thus not pertinent here. Not surprisingly, therefore, they have not been relied upon in decisions by this Court on issues of state court jurisdiction.

Furthermore, *Mathews* v. *Eldridge* and similar cases also are readily distinguishable because they involve the balancing of governmental needs not present here against due process values. At issue in *Mathews* v. *Eldridge* were the procedures to be followed by the Social Security Administration in handling the program entrusted to it. Indeed, the agency could not function without a procedure for hearing claims under that program. In balancing the competing interests, the Court recognized that giving broad procedural rights such as hearings to claimants would necessarily adversely affect the agency's overall ability to administer the program effectively and efficiently, and would negatively bear upon the allocation of the agency's limited resources.[5]

But in this case, Illinois attempts to adjudicate claims arising under the laws of other States, even though Illinois has no connection with the development of those claims and no specific institutional purpose in distributing the damages that the plaintiff claims on behalf of the nonresidents. Recognition of the traditional rights of nonresidents with respect to personal jurisdiction will not adversely affect any legitimate interest of Illinois. The supposed desire of Illinois to utilize the claims of *nonresidents* in order to provide

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[5] This Court has drawn a distinction between entitlements to property rights allocated through government agencies and claims between private individuals arising under state law. Only in the former category of "public rights" have the requirements of jury trial, an Article III court, and other aspects of a traditional adjudication been in any way compromised. See *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, ____ US.. ____, 73 L Ed2d 598, 614 (1982); *Atlas Roofing Co.* v. *Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 450, n.7 (1977). In the latter category, no "balancing test" has ever been employed to deprive litigants of any of the traditional aspects of a full adjudication. A State cannot be allowed to employ a "balancing test" to deprive litigants of any of the tradtional aspects of due process in adjudicating claims arising in other States.

the "powerful vehicle" of a nationwide class action to induce its own citizens to assert their rights (Resp. Brf., p. 23) is not a legitimate interest of Illinois, and its recognition would illogically suggest awarding the State with the fewest class members the strongest claim to entertaining a nationwide class. Nor is reducing the burdens on courts of *other* States (Pub. Citizen Brf., pp. 17-18) a legitimate interest of Illinois, especially in the absence of any indication that other States *want* to be relieved from adjudicating the rights of their citizens.[6] And in any event the supposed burdens of multiple identical class actions in other States can be eliminated by means of nationwide class actions that are compatible with the traditional limitations on state court jurisdiction (see pages 13-14, *infra*).

III. THE DEPARTURE FROM TRADITIONAL LIMITATIONS ON STATE COURT JURISDICTION PROPOSED BY RESPONDENT IS UNPRINCIPLED AND UNWORKABLE

In contrast to the familiar "minimum contacts" jurisdiction standard of *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), which has been carefully elaborated in numerous decisions of this and other courts, the considerations which respondent and respondent's allied *amici* suggest should apply to jurisdiction issues in class actions lack any clear guiding principle or any workable standard of application. Respondent and *amici* Public Citizen and Tyrone Fahner, et al., would have jurisdiction over class members turn not only upon the existence of "contacts" or consent, but also upon such irrelevancies as the size of the claims involved (Resp. Brf., pp. 19; Pub. Citizen Brf.,

[6]Even the state attorneys general who appear as *amici* in this case seek affirmance to confirm their own right to bring nationwide consumer class actions, not to endorse the easing of any burdens on the courts of their States (Fahner Brf., pp. 1-2, 11-12).

pp. 12-13), the existence of other lawsuits on behalf of the class (Resp. Brf., p. 19; Pub. Citizen Brf., pp. 15-16), whether class members are denominated as plaintiffs or defendants (Resp. Brf., p. 13n., Pub. Citizen Brf., pp. 12-13), whether the claims are on behalf of consumers (Resp. Brf., p. 31; Fahner Brf., pp. 9-12), and whether "ancillary risks of litigation" and other problems are reduced by rules or the exercise of judicial discretion (Resp. Brf., pp. 17, 23, 27).

By suggesting consideration of these factors respondent and *amici* implicitly recognize the error of the extreme position taken by the court below[7] which, in allowing nationwide classes upon a showing of nothing more than notice and "adequate representation," would permit any state court to adjudicate any nonresident's claim of any size, no matter how personal or localized the claim might be. But the tests proposed by respondent and his supporters are not a feasible alternative because they are essentially arbitrary, bearing no relationship to the purposes of due process limitations on state court jurisdiction, and therefore are not capable of rational or principled application.

Furthermore, in response to petitioner's showing of the unlikelihood of a state court in a nationwide class action correctly applying the law of each of the other States (Pet. Brf., pp. 19-23), respondent and one *amicus* suggest that it would be appropriate for a forum State to apply the law of just one State to all claims (Resp. Brf., p. 30; Cons. Coal. Brf., pp. 18-19). This expediency, however, would merely increase the likelihood that claims of class members would be decided in a different way than in the

[7] *Amicus* Consumer Coalition, on the other hand, would apparently go further than the court below, eliminating even the requirement that nonresidents be notified of the proposed adjudication (Cons. Coal. Brf., pp. 26-29).

courts of States with which they have contacts and thus shows no regard for the interests of other States and their residents.

What respondent and his supporters are really saying in their briefs is that the considerations supporting traditional limitations on state court jurisdiction are outweighed by the need to secure adjudication of consumer claims that are of such little consequence that they do not justify state-by-state consideration and are individually so insignificant that claimants will not bother to submit them to a tribunal voluntarily. Such a proposition must be rejected, not only because the concerns of federalism and fairness embodied in the "minimum contacts" rule have far greater importance than respondent attributes to them, but also because the debatable objective of fostering consumer lawsuits involving such claims can, if desired, easily be attained by Illinois or any State by other clearly constitutional means.

IV. APPLICATION OF TRADITIONAL LIMITATIONS ON STATE COURT JURISDICTION DOES NOT DIMINISH THE UTILITY OF CLASS ACTION PROCEDURES IN APPROPRIATE CASES

A consistent theme running through the briefs of respondent and respondent's supporting *amici* is the irresponsible assertion that applying traditional limitations on state court jurisdiction to class actions necessarily will preclude class actions in state courts on behalf of nationwide classes and require all controversies involving persons in numerous States to be separately decided in each State. This assertion is wholly unfounded and ignores the numerous multistate class actions that have been successfully litigated in state courts under existing jurisdictional standards.

In most instances (and in all instances in which uniformity in the adjudication of class members' rights is important) there will be one or more States that have sufficient "minimum contacts" to adjudicate all claims of a nationwide class. The prior decisions of this Court upholding state court adjudication of rights of nonresident class members, discussed at pages 4-6, *supra*, fall into this category. Surely it is in the interest of justice to have matters such as are involved in these cases (*e.g.*, rights of members of a fraternal benefit association, rights of trust beneficiaries) decided in the courts of a State with sufficient contacts with all interested parties, and not wherever a class member might choose to bring a suit. The assertion of jurisdiction in these nationwide class actions is consistent with the flexible "minimum contacts" standard, as described in *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 292 (1980).

When persons in numerous States do *not* have "minimum contacts" with a single State, a nationwide class action on their behalf still can proceed in the courts of any State that wishes to hear it if their affirmative consent to jurisdiction is obtained by means of an "opt in" procedure.

The flexible principles of state court jurisdiction announced in *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), easily can accommodate the desirable functions provided by class actions. Departure from those principles in class actions is thus unnecessary and would create a procedural morass and invite serious abuse of the class action device.

V. GILLETTE HAS STANDING TO RAISE THE QUESTION PRESENTED, AND THAT QUESTION IS RIPE FOR REVIEW

Respondent again raises (Resp. Brf., pp. 7-11; see also Pub. Citizen Brf., pp. 5-9) the issues of standing and

finality that he raised in his brief in opposition to the petition for certiorari in this case.

The standing of Gillette to raise the question before the Court in this case is clearly established by *Hanson* v. *Denckla*, 357 U.S. 235, 244-245 (1958). In that case certain defendants over whom the Florida state court admittedly had jurisdiction were held to have standing to challenge the Florida court's assertion of jurisdiction over Delaware trustees who were indispensable parties to the litigation. The Court said that when acquisition of jurisdiction over a nonresident is required before a state court is empowered to proceed with the action, then

> "... any defendant affected by the court's judgment has that 'direct and substantial personal interest in the outcome' that is necessary to challenge whether that jurisdiction was in fact acquired." (*Id.*)

Since a class member in this action is undisputably an indispensable party to the adjudication of his own claim against Gillette, the *Hanson* rule is directly applicable here.

Although the arguments that Gillette has made in support of its position necessarily involve discussion of the rights of others, Gillette itself has a vital and direct interest in the question presented. The decision below requires Gillette to litigate some 168,000 claims against it in a court that may be unable to render a judgment in Gillette's favor that will be given full faith and credit in States where the claimants reside. Surely that is a sufficient interest to give Gillette standing to raise the jurisdiction issue. And having standing, Gillette is entitled, as in any case, to raise all relevant policy considerations in support of its position, even if those considerations involve rights of others.

The finality of the decision below for purposes of review in this Court is established by decisions of this Court such

as *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555, 558 (1963). Here, as in *Langdeau*, the state court has rendered a complete and final decision on a federal issue that is "a separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising the plaintiff's cause of action." That issue should be determined now in order to avoid subjecting the parties to "long and complex litigation which may all be for naught". *Id.* See also *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 482-483, 506 (1975).

The Illinois Supreme Court obviously had before it all the facts it considered necessary to decide the constitutional issue presented, and it rendered a final decision on that issue on appellate review which was initiated by the respondent. The record establishes, and all parties concede, that nonresident class members here do not have any contacts with Illinois; thus further proceedings will not improve the "factual framework" (Resp. Brf., p. 10) within which to review the decision below. That undecided state law issues remain in the case does not prevent review of final state court judgments as to jurisdiction over nonresidents under the United States Constitution when, if jurisdiction is lacking, there will be "no trial at all" of nonresidents' rights in the forum State. *Shaffer* v. *Heitner*, 433 U.S. 186, 195 n. 12 (1977). *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286 (1980); *Kulko* v. *California Superior Court*, 436 U.S. 84 (1978).

CONCLUSION

For the reasons stated in this brief and in Gillette's prior brief, the judgment of the Illinois Supreme Court should be reversed insofar as it applies to petitioner's motion to dismiss claims of nonresident class members, and the order of the Circuit Court of Cook County, Illinois, granting such motion should be affirmed.

Respectfully submitted,

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Amicus Brief

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Office - Supreme Court, U.S.
FILED
AUG 5 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1493

In the

Supreme Court of the United States

OCTOBER TERM, 1982

THE GILLETTE COMPANY,

Petitioner,

v.

STEVEN MINER,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of The State Of Illinois

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICUS CURIAE THE CONSUMER COALITION

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The Scheffer Press, Inc.—(312) 263-6850

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In The

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October Term, 1982

No. 81-1493

THE GILLETTE COMPANY,

Petitioner,

v.

STEVEN MINER,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of The State Of Illinois

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICUS CURIAE THE CONSUMER COALITION

Amicus, the Consumer Coalition, moves pursuant to Supreme Court Rule 36.3 for leave to file the accompanying Brief in support of Respondent, Steven Miner. The Consumer Coalition is an Illinois not-for-profit corporation, organized for the advancement of the rights of consumers in the courts and in the marketplace. The Consumer Coalition was Amicus in the proceedings below in the Supreme Court of Illinois.

The position urged by the Gillette Company ("Gillette") and its supporting Amici would destroy the multi-state class action which has been regularly employed by both the state and federal courts. The multi-state class action is the only way for consumers as well as multi-state enterprises whose rights involve the claims of similarly situated persons residing in the fifty states to obtain a complete adjudication. Without the multi-state class action, fifty simultaneous class actions would be required to completely determine the rights and obligations of a multi-state class as well as of a multi-state enterprise. The specter of fifty state court judges and counsel for the plaintiffs and defendants simultaneously conducting fifty fragments of the same litigation and of fifty courts simultaneously conducting discovery with the same defendant is invoked in the name of due process. Under Gillette's argument, the only relief from this specter would occur if the rights of class members residing in certain states were not adjudicated. These persons would then lose their claims without a day in court. Ironically, the deprivation of their day in court is supposedly justified to protect the due process rights of the absent class members. And, if the position of Gillette and its Amici were upheld, in those instances where, as has often occurred, a multi-state enterprise seeks relief from a national class, the court system would be confronted with the same fifty trial specter.

Much more is involved here than whether the *Miner* litigation itself will continue to proceed as a national class action. The very ability of the courts to render adjudications when multi-state conduct affects a widespread group of similarly situated persons is at stake. Moreover, there are features of the *Miner* case which are

distinct from other multi-state class actions. For example, in the instant case, plaintiff has pled the statutory laws of fifty states. On the other hand, in the overwhelming majority of nationwide class actions, the laws of one state are properly applied.

Amicus submits that the parties to the proceedings will not adequately represent the interests of a broad range of consumers. Amicus believes that arguments in support of the exercise of jurisdiction over non-resident class members without reference to minimum contacts will not be presented in the same form by either the parties to this action or by other Amici. Amicus has sought the consent of counsel for Respondent and of counsel for Petitioner for leave to file the accompanying brief. Counsel for Petitioner has denied this request. For the foregoing reasons, Amicus, Consumer Coalition, prays that this Court grant its Motion for Leave to File the accompanying Brief in support of Respondent.

Dated: August 4, 1982.

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BRIEF OF AMICUS CURIAE THE CONSUMER COALITION

INTEREST OF AMICUS CURIAE

The Consumer Coalition is an Illinois not-for-profit corporation, organized for the advancement of the rights of consumers. The Coalition was Amicus in the proceedings in the Illinois Supreme Court below. Having more fully set forth the identity and interests of Amicus in this case in its Motion for Leave to File its Brief, Amicus simply states that the rule urged by Petitioner, Gillette Company ("Gillette") and the Amici in support of Gillette, if upheld, would in most instances bar, and in the remaining instances substantially impair, the ability of consumers and others to obtain redress in the courts of this country for violations of their rights by multi-state enterprises.

SUMMARY OF THE ARGUMENT

The "minimum contacts" test urged by Gillette would destroy the multi-state class action which has been regularly employed by both state and federal courts since the early part of the century. The multi-state class action is the only way to resolve disputes between multi-state enterprises and multi-state classes of similarly situated persons. The destruction of the multi-state class action, urged by Gillette, would require fifty class actions to adjudicate what has traditionally been determined in one action in the state, and which could be adjudicated in one action in the federal system. Fifty state judges would be required to adjudicate fragments of the same litigation, conducting discovery proceedings and subsequently fifty trials against the same multi-state defendant. The only relief from this specter would occur if the rights of class members residing in certain states were not adjudicated and those class members lost their claims without a day in court. Ironically, the deprivation of their day in court is urged by Gillette to protect the due process rights of these persons. And if a multi-state enterprise sought relief from a national class, as has often been the case, the state court system would be confronted with the same fifty trial specter. Even if these trials could be conducted, they would subject the litigants to conflicting adjudications which the multi-state class action has historically served to prevent. Gillette does not seek and this Court would not tolerate the imposition of such a burden on the federal courts.

Finally, the Illinois Supreme Court opinion contains broad language regarding the requirement of individual pre-trial notice to all identifiable class members. This issue is not raised by the Petition and has not been briefed by the parties. It is of enormous gravity and should not be addressed by this Court in this case. This Court is urged not to adopt the notice language of the Illinois Supreme Court.

ARGUMENT

I. THIS COURT SHOULD NOT APPLY THE MINIMUM CONTACTS TEST OF PERSONAL JURISDICTION TO NON-RESIDENT CLASS MEMBERS IN STATE COURT ACTIONS.

A. GILLETTE SEEKS A RADICAL CHANGE IN THE LAW GCVERNING CLASS ACTIONS WHICH WOULD HAVE A DEVASTATING EFFECT ON CLASS ACTIONS AND ON THE COURTS WHICH MUST ADMINISTER THESE ACTIONS.

Gillette's contention here is that no plaintiff class may include absent class members unless those class members satisfy the "minimum contacts" test for jurisdiction over litigants in individual actions and primarily for jurisdiction over defendants. Gillette's claim is contrary to the body of law applied in this country for as many years as class actions have been litigated and jurisdictional principles applied. The opinions of this Court and all of the lesser courts are overwhelmingly against the radical argument Gillette puts before this Court. And even moreso than this overwhelming authority, the destructive effect of Gillette's position on class actions and the administration of justice demands its rejection.

Class actions are simply "a different animal" from individual actions in which all of the parties personally participate in the court proceeding. Since the latter part of the 18th Century, *see, e.g., Smith* v. *Swormstedt,* 57 U.S. 288 (1853), courts have been conducting multi-state or non-resident class actions without applying the jurisdictional principles applicable to individual actions. Some of the cases contain explicit discussion of the issue and

some do not. But all are premised on the long-standing rule that class actions are not governed by the jurisdictional rules applied to individual actions. Because of the sheer number of such cases, it is not possible to cite them all in the body of this brief. Appendix A to this brief contains a small sampling of multi-state class actions conducted without the limitations of normal jurisdictional principles. This great body of multi-state class actions exists because the courts have consistently refused to subject absent class members to the jurisdictional rules applicable to individual cases. This Court, in particular, has rejected time and again the very principle that Gillette here espouses.

In 1877 this Court established the principle that due process imposed territorial limits on a forum court in adjudicating individual actions. *Pennoyer* v. *Neff*, 95 U.S. 714 (1877). Under *Pennoyer*, jurisdiction required the presence of the defendant for determination of personal rights or the existence of *in rem* jurisdiction for determining ownership of property within the state. Subsequently, in *Hartford Life Insurance Co.* v. *Ibs*, 237 U.S. 662 (1915), this Court upheld a state court class action judgment against the collateral attack of a non-resident. Despite the assertion of *Pennoyer* by the non-resident, this Court did not even discuss its jurisdictional requirements. In upholding jurisdiction this Court instead relied on three elements. First, the case involved a representative or class action. "A court of equity permits a portion of the parties in interest to represent the entire body and the decree binds all . . . as if all were before the court." *Id.*, 237 U.S. at 672. Second, the defendant insurance company was subject to the jurisdiction of the court which rendered the judgment. Third, if the state court had not determined the rights of the

entire class and the litigation were fragmented before the courts of various states, it would have exposed the litigants to conflicting duties and obligations. "It would have been destructive of their mutual rights . . . to use the . . . fund in one way as to claims of members residing in one state and to use it in another way as to claims of members residing in a different state.

This Court also reaffirmed the non-applicability of the jurisdictional principles of individual law suits to class actions in collateral suits by non-resident plaintiffs urging the application of *Pennoyer*, also without discussing the jurisdictional requirements of *Pennoyer*, in *Supreme Council of the Royal Arcanum* v. *Green*, 237 U.S. 531 (1915); *Hartford Life Insurance Co.* v. *Barber*, 245 U.S. 146 (1917); and *Sovereign Camp of the Woodmen of the World* v. *William F. Bolin*, 305 U.S. 66 (1938). Subsequently, in *Hansberry* v. *Lee*, 311 U.S. 32 (1940), this Court reviewed its prior holdings and said that class suits were appropriate where some of the class members were ". . . not within the [normal] jurisdiction . . ." of the court. *Id.*, 311 U.S., at 41. And in *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1940), a suit to settle the accounts of a fiduciary, this Court again rejected a contention that a state court could not determine the rights of absent class members because they resided beyond its normal territorial jurisdiction. Again, the Court focused on the facts that the defendant was subject to the court's jurisdiction and that there is a need to completely determine the rights of all absent class members in one lawsuit. The Court again rejected the argument that Gillette makes here, brushing aside *Pennoyer*'s tests of jurisdiction.*

* Despite the arguments that *Pennoyer* prevented jurisdiction, none of the Supreme Court cases even investigate

More recently, this Court reviewed a collateral attack on the class action judgment of an Indiana state court personally binding insurance policyholders in numerous other states. *Underwriters National Assurance Co.* v. *North Carolina Life & Accident & Health Insurance Guaranty Ass'n,* ..... U.S. ....., 102 S.Ct. 1357 (Mar. 24, 1982). While the issue of the ability to bind non-residents

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• (Continued)
whether jurisdiction could be based on the *Pennoyer* requirements. Although some of these cases mention a common fund, this was not and has never been a basis of jurisdiction. The closest jurisdictional concept is *in rem.* But in all of these cases the class action determined personal rights, not possible under *in rem,* and did not discuss *in rem.* Thus, class actions approved by this Court determined whether the policyholders' certificates could be amended to require continued payments after 20 years (*Sovereign Woodmen of the World* v. *Bolin,* 305 U.S. 66 (1938)); or whether the policyholder could be required to pay increased assessments (*Supreme Tribe of Ben Hur* v. *Cauble,* 255 U.S. 356 (1921); *Royal Arcanum* v. *Green,* 237 U.S. 531 (1915)); whether there was liability from insurance company management and whether assessments were too high (*Hartford Ins.* v. *Barber,* 245 U.S. 146 (1917); *Hartford Ins.* v. *Ibs,* 237 U.S. 662 (1915)) and whether the trustee was liable for breach of trust (*Mullane* v. *Central Hanover Bank and Trust Company,* 339 U.S. 306 (1950)). Furthermore, *in rem* jurisdiction would not have required the adequate representation the Court required. A representative suit was used as an independent basis of jurisdiction binding personal rights. And *Christopher* v. *Brusselback,* 302 U.S. 500 (1938), cited by Gillette (Gillette Brief, at p. 10), does not contradict the proposition that class actions are not subject to normal jurisdictional principles. In fact, the court in *Hansberry* v. *Lee,* 311 U.S. 32 (1940), cited *Christopher* in contrast to its class action cases showing that class action jurisdictional principles only applied when there was proper representation.

was not directly raised, this Court upheld the state court class action despite the fact that the Indiana court determined the rights of policyholders who were neither residents of Indiana nor persons over whom the Indiana court could have exercised jurisdiction under the "minimum contacts" test.

And based on its holdings in connection with state court class actions, this Court has permitted the federal courts to conduct class actions binding class members without regard to the territorial principles of jurisdiction applied by those courts in individual actions. In *Supreme Tribe of Ben Hur* v. *Cauble,* 255 U.S. 356 (1921), this Court rejected a collateral attack on a class action in a federal district court under diversity jurisdiction. This court held that the jurisdictional rules of *Pennoyer* v. *Neff* did not prevent inclusion of non-residents in a federal court class action and therefore held that diversity was proper, concluding that "*. . . a class suit of this nature might have been maintained in a state court and would have been binding on all of the class . . .*" 255 U.S. at 366 (emphasis added). And this Court most recently upheld a nationwide class suit conducted in the federal district court of the State of Washington, *Califano* v. *Yamasaki,* 442 U.S. 682, 702 (1979). This suit adjudicated the rights of absent class members who quite obviously had no contacts with the state in which the federal court was located.

Thus, in the long history of the multi-state class action in the courts of this country, both the practice and authority overwhelmingly demonstrate that normal jurisdictional principles do not apply. Moreover, the number of cases conducting class actions without applying individual jurisdictional limitations is of enormous import, even if some of those cases do not explicitly discuss jurisdiction. This issue has been so well settled for so long that

it would not be necessary for a court to discuss. Surely the number of cases conducting multi-state class actions without applying principles of jurisdiction routinely applied in individual cases could not have been a mere oversight on the part of the courts.

Despite the fact that Gillette's position is against the overwhelming weight of authority, Gillette still contends that jurisdictional principles applicable to individual actions apply to class actions. In fact, their principal substantive contention on this point is not an affirmative but a negative one. Gillette concedes that the federal courts are not required to apply jurisdictional limitations but says this has no bearing on the state courts. (Gillette Brief, at 15, n. 1). This is incorrect. Generally the federal court has no greater personal jurisdiction than the courts of the state in which it sits. Federal Rule of Civil Procedure 4(f); *Insurance Company of Ireland* v. *Compagnie des Bauxites de Guinea,* U.S. Sup.Ct., 50 U.S.L.W. 4553 (June 1, 1982), (concurring opinion of Justice Powell at 4558). The *Dalkon Shield* Plaintiffs, however, point out that the federal courts have nationwide service of process in certain specific situations. However, this does not distinguish federal from state class action jurisdiction. Nationwide service of process is limited to specific federal questions, and nationwide class actions have been conducted in diversity cases and in federal question cases where no nationwide service is provided. Furthermore, the federal courts never mention the limitations of service of process in determining the propriety of the class and treat these limitations as irrelevant. More importantly, the federal, as well as the state system, is subject to due process. While the Due Process Clause applicable to the federal system is found

in the Fifth rather than the Fourteenth Amendment, there is no basis for different treatment with respect to the issues here. Thus, if an Illinois class action would unreasonably impose on the rights of an Indiana citizen, that citizen would be imposed on no less if the adjudication was conducted by a federal court sitting in Illinois than by an Illinois state court. And, if such an adjudication were truly an imposition on the sovereignty of Indiana, that state would suffer no less because the adjudication was rendered in a federal court. Further, the degree of imposition on the state and its citizen in having the citizen "haled" to a state with which he has no contacts would not turn on a distinction between diversity and federal question jurisdiction. Moreover, whether Congress has authorized nationwide service has no bearing. Even acts of Congress are subject to the constraints of due process. Gillette's contention is further refuted by the fact that federal court multi-state class action jurisdiction is predicated on the state court class action jurisdictional holdings of this Court. *See Supreme Tribe of Ben Hur* v. *Cauble;* 3B *Moore's Federal Practice,* ¶23.11[5], at 23-2893.

B. THE MULTI-STATE CLASS ACTION SERVES IMPORTANT STATE INTERESTS WHICH WOULD BE DEFEATED BY THE APPLICATION OF THE "MINIMUM CONTACTS" TEST.

Gillette has grounded much of its argument for the necessity of applying the "minimum contacts" test to class actions upon the need to protect the due process rights of states. But due process is not a vehicle for the protection of sovereign rights of sister states. Neither the express words nor the history of its enactment supports such a contention. *See* Redish, *Due Process, Feder-*

alism and Personal Jurisdiction: A Theoretical Evaluation, 75 Nw. L. Rev. 1112 (1981). And as this Court recently said:

> The restriction on state power described in *World-Wide Volkswagen Corp.,* however, must be seen as ultimately the function of the individual liberty interest preserved by the Due Process Clause. That Clause is the only source of the personal jurisdiction requirement and the Clause, itself, makes no mention of federalism concerns. Furthermore, if the federalism concept operated as an independent restriction on the sovereign power of the court, it would not be possible to waive the personal jurisdiction requirement. Individual actions cannot change the power of sovereignty . . . *Insurance Corp. of Ireland* v. *Compagnie des Bauxites de Guinea,* 50 U.S.L.W. 4553, at 4556, n. 10 (June 1, 1982).

Since due process is not designed to insulate a state's "sovereign rights" from "intrusion", no determination of the impact of the multi-state class action on the interests of the states is relevant or required. It is clear, however, that the continued conduct of multi-state class actions without "minimum contacts" is of utmost importance to the interests of the state court system.

First, application of the "minimum contacts" test to absent class members would, in almost every case, prevent the inclusion of non-resident class members. Non-resident class members can almost never satisfy the jurisdictional tests applicable to individual lawsuits. This would clearly have been true under the "presence" test of *Pennoyer* v. *Neff,* and it would be no less true under the "minimum contacts" test of *International Shoe Co.* v. *Washington,* 326 U.S. 310 (1945), and its progeny. Multi-state class actions almost universally involve large multi-state enterprises which by one or a series of iden-

tical acts affect a widespread group of persons in the same way. Normally the absent class members have not come to the forum to participate in the transaction giving rise to the lawsuit. Thus, the entire class will not have "minimum contacts" with any one state and application of that test would require a multiplicity of piecemeal lawsuits, and generally prevent vindication of many persons' rights.

A few examples will demonstrate. The insurance industry, some of whose members have filed an amicus brief urging the application of the "minimum contacts" test to multi-state class actions, has much to lose. Insurers have frequently sought relief from national classes of policy holders. *See, e.g., Sovereign Camp of the Woodmen of the World* v. *William F. Bolin,* 305 U.S. 66 (1938); *Underwriters National Assurance Corp.* v. *North Carolina Life & Accident & Health Insurance Guaranty Ass'n,* ..... U.S. ....., 102 S.Ct. 1357 (March 24, 1982); *Carpenter* v. *Pacific Mutual Life Insurance Co.,* 10 Cal. 2d 307, 74 P. 2d 761 (1937); *aff'd sub nom. Neblett* v. *Carpenter,* 305 U.S. 297; *Royal Arcanum* v. *Green,* 237 U.S. 531 (1915). The non-resident policyholders purchase their policies from local agents and do not have contact with the forum. Their last expectation would be to be "haled" before a foreign court. They could not satisfy the "minimum contacts" test. *Worldwide Volkswagen* v. *Woodson,* 444 U.S. 286 (1980). Although these suits create none of the problems of which Gillette and its Amici profess concern, application of the "minimum contacts" test would prevent national class actions such as these which this Court has specifically upheld. The same is true of the settlement of a trustee's account against non-resident trust beneficiaries. *See, e.g., Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U.S. 306

(1950). Non-resident beneficiaries generally acquire their interest by the act of a grantor or testator, and their conduct is not such as to cause them to anticipate being "haled" before a foreign court. While such a suit causes none of the problems hypothesized by Gillette, application of the "minimum contacts" test would prevent the conduct of another example of a national class action upheld by this Court.

In *Schlosser* v. *Allis Chalmers Corp.*, 86 Wis. 2d 226, 271 N.W. 2d 879 (1978), a nationwide company was sued by a class of employees alleging breach of contract in connection with a pension program. The company unsuccessfully urged application of the "minimum contacts" test despite the fact that the case raised none of the problems hypothesized by Gillette and despite the fact that application of the test would have required fragmented state-wide class actions in at least 21 different states. *Schlosser*, 271 N.W. 2d at 885. One must suspect that had the company sought relief from its employees it would not have argued for application of the "minimum contacts" test. A review of other examples of multi-state class actions cited in Appendix A demonstrates that even though these cases cause none of the problems hypothesized by Gillette, they could not have been adjudicated under the "minimum contacts" test.

While some multi-state enterprises like Gillette or the insurance amici would hope to deprive absent class members of their day in court, application of the "minimum contacts" test would be an enormous burden when they themselves sought relief from a national class. If class actions are to be subject to territorial limitations where a multi-state class seeks relief, these limitations must also apply when a multi-state enterprise seeks relief from a multi-state class. The result

cannot depend on whether the relief is sought by or against the enterprise. The "minimum contacts" test cannot be used to accomplish, and the equal protection clause cannot permit, such a result.

Destruction of the multi-state class action would cause enormous harm to the legitimate interests of the states and their courts. The state courts would be required to conduct fifty identical lawsuits to accomplish the kinds of adjudications which have traditionally been done in one court and which will still be done in one federal court. Multiplying the number of lawsuits would place a staggering burden on the state system. Even if the state courts could accept the burden of additional suits, fragmenting the same suits would of itself frustrate significant state interests. As reflected in the various class action statutes, *see, e.g.,* Fed. R. Civ. P. 23(b)(1)(A); Advisory Committee Notes, Rule 23, 39 F.R.D. 73, 100-02 (1966); Ill. Rev. Stat. ch. 110 §57.2(4); Historical and Practice Notes, S.H.A. ch. 110 §57.2, at 135 (Supp. 1981), and in the class action decisions of this Court, *see, e.g. Hartford Insurance Co.* v. *Ibs*, 237 U.S. 622, at 670-71 (1915), the very purpose of the class action is to free the litigants from the conflicting adjudications of multiple lawsuits. Fragmentation would also frustrate another equally important purpose for which courts have conducted class actions. The state which serves as a forum for non-resident claims is serving the interest of resident plaintiffs whose ability to get a day in court is dependent on the aggregation of similar claims of non-residents.* The burden of conducting fifty class suits is not

* The argument that this Court's refusal to destroy multi-state class actions would impose greater expenses on taxpayers of the various states is fallacious. (See

one that could normally be borne by a major multi-state enterprise, let alone a class of small claimants lacking the concentration of economic power of such an enterprise. *See, e.g., Deposit Guaranty National Bank* v. *Roper,* 445 U.S. 326, 339 (1980); *Hawaii* v. *Standard Oil of Caliofrnia,* 405 U.S. 251, 266 (1972). The "minimum contacts" test simply bears no relation to, and would defeat, these legitimate state interests.

Significantly Gillette has asserted that no similar limitations be placed on the federal court's conduct of the multi-state class action. Gillette is suggesting, however, that this Court impose burdens on the state court system which would be unthinkable in the federal system where the federal courts have consistently conducted multi-state class actions without minimum contacts.

In fact, the ability of the federal courts to fully adjudicate one matter in one litigation has been given great importance in other areas of federal practice. For example, in order to protect the state courts against intrusion of federal courts in state matters, Article III of the Federal Constitution expressly imposes subject matter limitations on the federal courts. Despite this express prohibition, when a state issue arises out of the same matter as a federal cause of action, in the interest of having the entire matter completely adjudicated in one lawsuit, this Court has permitted the federal court to adjudicate both the federal and state issues. *United Mine Workers* v. *Gibbs,* 383 U.S. 715, 726 (1966); *Osborne* v. *Bank of the United States,* 22 U.S. 737 (1824).

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* (Continued)
Amicus brief of the New England Legal Foundation at p. 30). Upholding the continuation of national class actions would permit, but not require, multi-state suits.

It has been said that without this power "a court of original jurisdiction could not function". Wright, *Handbook of the Law of the Federal Courts,* 72 (3rd ed. 1976); *see also,* Shenkier, *Ensuring Access To Federal Courts: A Revised Rationale For Pendent Jurisdiction,* 75 Nw. L. Rev. 245 (1981).*

Finally, the conduct of the states further evidences their interest in multi-state class actions without minimum contacts. Like the federal courts' Rule 23, the states have routinely passed class action statutes without territorial restrictions. See Appendix B. And the state courts have conducted many multi-state class actions. See Appendix A. No state has ever adopted legislation seeking to curtail non-resident class actions or impose any territorial limitation on them. No state has filed an amicus brief or otherwise opposed the conduct of the *Miner* litigation as a national class action. The states' interests which Gillette seeks to raise are not the interests of the states, but solely the interests of a private party seeking to deprive others of their day in court.

C. THE MINIMUM CONTACTS TEST HAS NO APPLICATION TO NON-RESIDENT PLAINTIFF CLASS MEMBERS AND THE ASSERTION OF JURISDICTION IN THE ABSENCE OF SUCH CONTACTS IS NOT A DEPRIVATION OF THEIR DUE PROCESS RIGHTS.

Under the pretext of "concern" for the due process rights of class members, Gillette and its Amici seek an unwarranted and unprecedented extension of the "minimum contacts" test to class actions. Far from protecting the rights of the non-resident class members, the im-

* The interest of consolidating adjudications is also reflected in the Manual for Complex Litigation governing procedures in the federal courts.

position of the "minimum contacts" test would almost invariably deprive them of their day in court. The rights of these class members to a day in court should not be sacrificed on the pretext of protecting their due process rights.

The "minimum contacts" test for personal jurisdiction arose in the context of the due process rights of non-resident defendants. *See International Shoe Co.* v. *Washington.* The forum was required to have sufficient contacts with the defendant so that the "maintenance of the suit . . . not offend 'traditional notions of fair play and substantial justice' ". *Id.*, 326 U.S. at 316. This requirement flows from the defendant's due process rights and not from state sovereignty. *Insurance Corp. of Ireland, Ltd.* v. *Compagnie des Bauxites de Guinea,* U.S. Sup. Ct., 50 U.S.L.W. 4553 (June 1, 1982). The purpose of the "minimum contacts" test is the preservation of "individual liberties" by preventing a party from being "haled" before a court in a remote jurisdiction when such action is not justified by the party's reasonable expectation based upon its conduct. *World-Wide Volkswagen Corp.* v. *Woodson.* This purpose has no applicability or relevance to class actions, and, significantly, neither the "minimum contacts" test or any other test for individual jurisdiction has ever been applied or suggested by this Court in any collective or class action.* The reason for this is clear and goes to the nature of the class action. In an individual action, a party's presence is required, and, unlike a class action, no one stands in his stead. If a party does not personally appear or provide his own representative, his interests will not be

* In fact, the only cases in the long history of the multi-state class action which have imposed this test are the cases cited by Gillette, *Feldman* v. *Bates* 143 N.J. Super 84, 362 A.2d 1177 (1976), and *Klemow* v. *Time, Inc.,* 466 Pa. 189, 352 A.2d 12 (1976).

represented. Thus, in an individual action, under some circumstances, it may "offend traditional notions of fair play and substantial justice" to require an individual to appear in a remote forum.

But these circumstances simply do not obtain in class actions which, by definition, are conducted through representatives. Absent class members are not required to appear or participate in the actions. Moreover, it makes no difference whether the absent class member resides within or without the forum state. He is not being "haled" before the court. Rather, his right to due process is protected by the class representative, obviating the need to test for his "minimum contacts" with the forum.*

D. THE PROBLEMS SUGGESTED BY GILLETTE AND ITS AMICI ARE HYPOTHETICAL AND UNREALISTIC AND DO NOT JUSTIFY THE ABOLITION OF THE MULTI-STATE CLASS ACTION THROUGH THE IMPOSITION OF THE MINIMUM CONTACTS TEST.

Gillette and its supporting Amici have based their argument against multi-state class actions on an apocalyptic vision of insoluble problems which they claim will arise if the minimum contacts test is not applied to future class actions. Their arguments are belied by over a century of successful multi-state class actions, and, significantly, they identify no class action in which the problems they pose have actually occurred. But if and when any such hypothetical problems do arise, rather than eliminate the entire multi-state class action procedure, specific solutions should be employed.

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* Particularly where, as here, absent class members may opt out, it is difficult to see the conduct of this action as an imposition on their rights violative of "traditional notions of fair play and substantial justice." *See Insurance Corp. of Ireland* v. *Compagnie des Bauxites de Guinea,* U.S. Sup. Ct., 50 U.S.L.W. 4553 (June 1, 1982); Ill. Rev. Stat. ch. 110, §57.5.

1. Multi-State Class Actions Generally Do Not Require Application Of The Laws Of Foreign States And State Courts Are Not Incompetent To Apply Such Laws When Required To Do So.

Gillette and its Amici suggest: (1) that a multi-state class action must apply the laws of many foreign states, and (2) such actions cannot proceed because of a state court's inability to properly do so. Neither allegation is supported.

First, in the overwhelming majority of multi-state class actions, not only has it not been necessary to apply the laws of fifty states, but in fact it has not been necessary to apply the law of more than one state. (See the multi-state class actions upheld by this Court (Section A, *supra*) and the cases cited in Appendix A hereto.)* Modern choice of law rules provide for considerable flexibility and give significant weight to the convenience of the court in choosing the state law to apply. The "simplification of the judicial task" is a significant consideration in the choice of law. *Allstate Ins. Co.* v. *Hague*, 449 U.S. 302, 306 (1981). These principles generally permit application of the laws of one state, often those of the forum, to conduct affecting a multi-state class. For example, the "grouping of contacts" approach used in *Oakes* v. *Chicago Fire Brick Co.*, 398 Ill. 474, 479, 59 N.E. 2d 460

* Atypically, plaintiffs in this case chose to specifically plead the statutory laws of fifty states, conceivably leading to the application of these laws to the extent they differ among each other. Under applicable choice of law and constitutional principles, however, the law of one state, *i.e.*, Massachusetts, could easily have been applied to the entire transaction. *Allstate* v. *Hague*, 449 U. S. 302 (1981); *see also, Leflar, Choice-Influencing Considerations in Conflicts of Law*, 41 N.Y.U. L.Rev. 267 (1966).

(1945), and *Schlosser* v. *Allis-Chambers Corp.*, 86 Wis. 2d 226, 271 N.W.2d 879 (1978), permits the application of the laws of one state to actions based on contracts, while the position of the Restatement (Second) of Conflicts of Law §945(2) permits the application of the law of one state to tort actions.

Furthermore, even in the hypothetical instance where the forum state court would have to apply the law of all the other states, there would often be no differences among those laws material to the court's determination. Even if there were such differences, it would be rare indeed that the number of doctrines among the states would exceed two or three. The mere fact that the laws of fifty states have to be applied does not mean that there are fifty different rules of law upon which the outcome of the case depends. Thus, there would be no need for fifty sub-classes as suggested by Gillette. In fact, while Gillette has repeatedly striven to point out the differences among the laws of the states here, no differences material to the outcome of this case have been identified. But, even if the worst situation obtained, and it were necessary for the forum state, in a case otherwise appropriate for class action treatment, to apply the laws of fifty states, thereby requiring fifty sub-classes, it seems clear that this would be far less impractical than having fifty state courts apply their own law in fifty separate lawsuits. Gillette's arguments based on impracticability are simply not well taken.

Implicit in Gillette's arguments is the notion that state courts are not competent to apply the laws of other states, notwithstanding the fact that federal courts in diversity cases constantly determine and apply the laws of the various states. This argument is totally inconsistent with the role of the state courts in an interdependent fed-

eral union, is wholly unwarranted, and is not one to which this Court, under principles of federalism, should subscribe. Moreover, in individual actions state courts under choice of law rules routinely apply the laws of other states, irrespective of personal jurisdiction concepts.

Thus, not only do Gillette and its Amici contend that it is inappropriate for a forum state to apply the laws of other states in a class action, but also that somehow it is constitutionally impermissible. Gillette's theory is that the Constitution requires the application of the law of each state of a class member's residence, that those states somehow have exclusive original jurisdiction to determine matters arising under their laws, and that, therefore, a forum court cannot entertain any class action involving non-resident plaintiffs. This theory is simply completely at odds with constitutional precepts (*See Allstate* v. *Hague, supra*) and with any reasonable approach to the organization of a federal union. No federal union could operate under such a principle, ours does not now, and it should not be required to do so in the future.

Similarly, the insurance Amici say that insurance is subject to specialized state regulation and that this court should create a constitutional rule requiring: 1) that the law of the state of each class member's residence apply, and 2) that each state of residence have exclusive original jurisdiction to determine such laws. Even if this position were correct, which it is not, it has nothing to do with the application of the "minimum contacts" test to this case or to the overwhelming majority of non-resident class actions, even those involving insurance companies. While the "minimum contacts" test would eliminate approximately 95% of the *Miner* class, there is no question of insurance regulation requiring exclusive

jurisdiction here. Requiring minimum contacts would also have eliminated the non-resident class members in *Hartford* v. *Ibs,* even though the conduct of that case contravened none of the policies urged by the insurer. (See also cases in Section A, *supra,* and Appendix A.)

Moreover, the "minimum contacts" test would not prevent a forum court from adjudicating matters under the laws of the state of residence when either the litigant had minimum contacts with the forum state or the litigant chose to participate in a forum court's adjudication. On the other hand, minimum contacts would prevent the adjudication of a multi-state class even though, as in the overwhelming majority of multi-state class actions, conflicts principles permit application of the forum's own laws. Significantly, the insurance Amici fail to point to a single non-resident class action which has ever violated the principles of exclusive original jurisdiction of regulatory matters which they propose here, or a single case or state statute providing for exclusive original jurisdiction in insurance matters. And, even in those individual cases where an issue has been raised which is subject to an insurance department's regulation, the Constitution has never been held to automatically require the application of the laws of the state of residence, or to require exclusive original jurisdiction in that state. (*See Allstate* v. *Hague* regarding the construction of an insurance policy (which is subject to State regulation) and cases cited therein; *see also, Underwriters National Assurance Corp.* v. *North Carolina Life & Accident & Health Insurance Guaranty Ass'n,* ..... U.S. ....., 102 S.Ct. 1357 (March 24, 1982)).

But whether or not there could be circumstances justifying exclusive original jurisdiction has no relevance here. At such time as this Court determines

that exclusive original jurisdiction is constitutionally required and a class action which would contravene this determination is before the Court, then, and only then, specific solutions should be imposed. Until that time, there is no reason to destroy an entire body of litigation procedures which have absolutely no relation to the hypothetical problems posed by the insurance Amici.

The *Dalkon Shield* Plaintiffs, on the other hand, contend, first, that they have a constitutional right to the control of their own lawsuit and, second, that they have a constitutional right to have the law of their state of residence applied by a court of their state of residence. Their first contention is premised on the concept that even if a fair adjudication can be afforded a class of 1,000 persons which would determine some or all of the issues common to that class, the Constitution still requires completely independent adjudications so long as the class members would prefer and are able to litigate the matter on their own. Whether the Constitution requires that the class members be permitted a fair procedure, or the procedure of the litigant's choice, is irrelevant to the issues in this case. It is not raised by any class members here, none of the class members here could afford to individually litigate their claims and all of the class members here have the right to opt out of the proceedings. (Ill. Rev. Stat., ch. 110, Sec. 57.5).

The *Dalkon Shield* Plaintiffs' second contention that they are Constitutionally entitled to the application of law of their state of residence is simply incorrect. *See Allstate Insurance* v. *Hague,* and cases cited therein. The Constitutional principles of choice of law are much broader in scope and permit consideration of far more than the residence of the plaintiffs. One of the principal considerations in fact is the convenience of the forum court. Furthermore, no litigant has the unfettered right to have

his lawsuit adjudicated in the state of his residence, or in the forum of his choice. In any event, the concerns of class plaintiffs like the *Dalkon Shield* Plaintiff, who have a real interest in trying their own lawsuits, do not really bear on the issue here.

Finally, Amicus New England Legal Foundation asserts that due process would be violated if a forum court adjudicated matters arising under another state's laws because the other state would have a "superior right" to conduct such an adjudication. That novel position is refuted by the everyday practice of the state and federal courts. (See also Section B, *supra.*) This contention is refuted by the fact that the states have consistently permitted national class actions, that no state has filed an amicus brief opposing this national class action, and that no state legislature has imposed territorial restrictions upon its class action statute.

2. The Contention That Insoluble Conflicts Will Arise Between The States Is Belied By The Long And Successful History Of The National Class Action, And Could Not In Any Case Justify Its Destruction.

Gillette and its Amici argue that the national class action will result in insoluble conflicts between the states and allege that this justifies its destruction by the imposition of the "minimum contacts" test. It does not. National class actions, without territorial limitations, have been conducted in both state and federal courts since the beginning of this century. They have not generated insoluble conflicts, and no insoluble conflict has arisen with respect to the *Miner* case itself. Nor do those who propose its destruction suggest why the conflicts which may someday arise will be insoluble. Problems and con-

flicts are an inherent part of any legal system. In the federal system, there are conflicts among the circuits and within the circuits. There are conflicts among the courts of the sister states and among the districts within each state. If the mere existence of occasional problems or conflicts justified the elimination of generally useful legal procedures, it is difficult to envision how our court systems could operate. Rather than eliminate a valuable procedure, specific solutions are found on a case by case basis. Well-known rules have become available for dealing with such conflicts, and if new problems of this type arise, there is no reason to believe that they will not be susceptible of solution as well. Destroying the multi-state class action because of such potential conflicts would be to throw the "baby out with the bathwater".

It is suggested by Gillette and its Amici that non-resident class action judgments will not be honored by other states. However, this Court has regularly solved this problem by requiring the sister states to give full faith and credit to national class action judgments. (*See Hartford Ins.* v. *Ibs, Hartford Ins.* v. *Barber,* and other cases cited *supra,* at 4-5).

E. THE AMENABILITY OF THE DEFENDANT TO THE JURISDICTION OF THE FORUM IN WHICH A VALID CLASS ACTION IS BEING CONDUCTED IS A SUFFICIENT NEXUS TO BIND NON-RESIDENTS.

The *Dalkon Shield* Plaintiffs suggest that if minimum contacts with the absent class members are not required, then due process requires some specific additional contact with the forum — some special relationship to the underlying activities. (See Amicus Brief of *Dalkon Shield* Plaintiffs, p. 11). This position is incorrect and should

not be adopted by this Court. The *Dalkon Shield* Plaintiffs appear to be relying on the fact that in such cases as *Hartford Life Ins. Co.* v. *Ibs* and *Mullane* v. *Central Hanover Bank,* the defendants were based in the jurisdiction where the action was brought. However, the basis on which this Court ruled that non-residents could be bound was not that the defendant's principal place of business was within the jurisdiction, but that the defendant was subject to the laws of the jurisdiction and that it was essential that the litigants be free of conflicting adjudications. See Section A, *supra.* So long as the court has jurisdiction over the defendant, it has the power and obligation to provide a complete determination. The absent class members' due process rights are not offended by and do not depend on the defendant's contact with the jurisdiction (see, *supra,* at 16-17), and the defendant's due process rights are fully protected if normal jurisdictional principles are applied. No greater contact or "nexus" is needed.

Preventing a state court conducting a valid class action from going forward with a complete determination as to the rights of all class members would frustrate the state's interest in providing a complete determination and in freeing the litigants of the risk of conflicting adjudications. It would create all of the problems of duplicative lawsuits and prevent the aggregation of claims necessary for claimants to obtain a day in court. Furthermore, it would frequently deprive absent class members of the only represenation available to them.

The contention that a state must have some interest in the underlying activity greater than its sister states ("superior contacts") has no basis in any policy or jurisdictional rationale. Furthermore, if an interest in the underlying activity were of significance, a state like

Illinois, which has more persons affected by the refusal of Gillette to make good its offer, may well have more interest even than the less populous state of Massachusetts, Gillette's principal place of business. This is borne out by the federal experience where, subject to normal rules of *forum nonconveniens* and venue, the federal courts have found it necessary to conduct nationwide class actions where the forum court had no peculiar relationship to the underlying transaction. *See, e.g., Appleton Electric* v. *Advance-United Expressways,* 494 F.2d 126 (7th Cir. 1974); *Philadelphia* v. *Morton Salt,* 248 F.Supp. 506 (E.D. Pa. 1965); *In re Antibotic Antitrust Action,* 333 F.Supp. 299 (S.D.N.Y. 1971) *mandamus denied sub nom, Pfizer, Inc.* v. *Lord,* 447 F.2d 122 (2d Cir. 1971); and *Califano* v. *Yamasaki,* 442 U.S. 682 (1979). This Court should impose no greater impediments on the state system.

II. THIS COURT SHOULD NOT ADDRESS THE ISSUE OF WHETHER AND WHEN THE CONSTITUTION REQUIRES INDIVIDUAL PRE-TRIAL NOTICE TO ALL IDENTIFIABLE CLASS MEMBERS.

The Illinois Supreme Court opinion below contains language which may be interpreted as a broad requirement of individual pre-trial notice to all identifiable class members.* This was not the issue upon which the Petition for Certiorari was granted, and has no relation to the issue of a multi-state class action. A class member's entitlement to notice would not depend on whether he lived outside of the forum. Because this issue has not

* The broad language of the Illinois Supreme Court is inconsistent with its prior holdings on notice, and may not reflect the intention of the court. *See, e.g., Frank* v. *Teachers Insurance & Annuity Ass'n of America,* 71 Ill. 2d 583, 376 N.E. 2d 1377 (1978).

been addressed by the parties, was not an issue in the courts below, has an insufficient factual basis in the record, and because it is of overwhelming importance to the future of class actions and other collective adjudications, it is respectfully submitted that this Court should not pass on it and should not adopt the notice language of the Illinois Supreme Court.

Because of the importance of this issue, and the uncertainty as to whether this Court will, in fact, address it, Amicus will briefly discuss notice. Requiring individual pre-trial notice would often terminate the litigation and deprive class members of a day in court. Note, *Class Actions: Certification and Notice Requirements,* 68 Georgetown L.J. 1009 (1980); 7A C. Wright & A. Miller, *Federal Practice and Procedure,* §1786 (1972 & Supp. 1982). Persons whose rights are determined are not always entitled to a hearing. Where determinations affect numerous similarly situated persons, "traditional notions of fair play" do not always require that every such individual be afforded a personal hearing. *Compare Bi-Metallic Co.* v. *Colorado,* 239 U.S. 441 (1915), *with Londonor* v. *Denver,* 210 U.S. 373 (1908). If the class is adequately represented, there is no constitutional requirement of individual hearings. *Hansberry* v. *Lee,* 311 U.S. 32 (1940). Where, however, representation is questionable, notice is constitutionally required but only to assure adequate representation. *Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U.S. 306, 319 (1950). The purpose of notice is to assure representation rather than to provide a personal day in court for each recipient.* 3B

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* In *Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950), the class was not represented by a similarly situated person, but by a public official with no stake in the outcome. Notice was not a practical impediment to the conduct of the action. *Eisen* v. *Carlisle & Jac-*

Moore's Federal Practice, ¶23.72 (1978 & Supp. 1982). *See also, Miller, Problems of Giving Notice in Class Actions*, 58 F.R.D. 313, 314 (1973).

If notice is required to assure adequate representation, the Constitution does not require pre-trial notice to each identifiable class member, but only a sufficient number "likely to safeguard the interests of all". *Mullane* v. *Central Hanover Bank & Trust*, 339 U.S. at 319. Any procedure likely to reach a cross section of class members sufficient to elicit representation from varying elements complies with the Constitution. Furthermore, if individual notice is to be given under a statute permitting opt out, it should be deferred until evidence has established who should bear the expense. If a defendant seeks individual pre-trial notice to all identifiable class members in order to obtain the protection of requiring the class members to exercise their option before a determination has been reached, then notice is for the protection of the defendant, and defendant should bear its cost. *See* Dam, "*Class Action Notice: Who Needs It?*", 1974 Sup. Ct. Rev. 97, 121-126. Requiring individual pre-trial notice to all class members will simply deprive them of their day in court.

Notice is not an important, but also a complex issue. *See* Miller, *Problems of Giving Notice in Class Actions*, 58 F.R.D. 313 (1973). This is not a proper case

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* (Continued)

quelin, 417 U.S. 156 (1974), is based on statutory interpretation rather than the constitution. 3B *Moore's Federal Practice* ¶23.72 (1978 & Supp. 1982); 7A C. Wright & A. Miller, *Federal Practice and Procedure*: Civil § 1786. Most of the class actions passed on by this Court have not involved notice. See, *supra*, p. 11; see cases at Appendix A.

for determinations regarding this issue. Amicus respectfully requests that this Court not address the issue of notice and refrain from endorsing the broad language of the Illinois Supreme Court opinion.

CONCLUSION

For the foregoing reasons and each of them, Amicus, the Consumer Coalition, respectfully requests that this Court deny the request of Gillette Company to apply the "minimum contacts" test to state court class actions, and permit the state courts, along with the federal courts, to continue to conduct multi-state class actions. Amicus also respectfully requests that this Court not adopt the broad "notice" language of the Illinois Supreme Court and expressly refrain from speaking to the issue of notice.

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APPENDIX A

MULTI-STATE CLASS ACTIONS IN STATE COURTS

Vann v. *Hargett,* 22 N.C. 31 (1838).

Gibson v. *American Loan & Trust Co.,* 12 N.Y.S. 444 (1890).

Crane v. *Crane,* 105 S.W. 370 (Ct. App. Ky. 1907).

Guffanti v. *National Surety Co.,* 196 N.Y. 452, 90 N.E. 174 (Ct. App. 1909.)

National Surety Corp. v. *Nontz,* 262 Ky. 413, 90 S.W.2d 385 (1936).

Carpenter v. *Pacific Mutual Ins. Co.,* 10 Cal.2d 307, 74 P.2d 761 (1937), *aff'd sub nom., Neblett* v. *Carpenter,* 305 U.S. 297 (1938).

Taylor v. *Pacific Mutual Life Ins. Co.,* 214 N.C. 770, 200 S.E. 882 (1939).

Anglo-Continentale Trust Maatschappij v. *Allgemeine Elektricitaets-Gesellschaft,* 171 Misc 714, 13 N.Y.S.2d 397 (1939).

Larson v. *Pacific Mutual Ins. Co.,* 373 Ill. 614, 27 N.E.2d 458 (1940).

San Francisco v. *Market St. Ry. Co.,* 95 Cal.2d 248, 213 P.2d 780 (1950).

Kimbrough v. *Parker,* 344 Ill. App. 483, 101 N.E.2d 61 (1st Dist. 1951).

Moser v. *Keller,* 303 S.W.2d 135 (1957).

Chance v. *Superior Court of Los Angeles County,* 23 Cal. Rptr. 761, 373 P.2d 849 (S. Ct. Cal. 1962).

Cocke v. *Duke University,* 260 N.C. 1, 131 S.E.2d 909 (1963).

Holstein v. *Montgomery Ward & Co.,* CCH Pov. L. Rep. ¶9,052 (1968-71 Transfer Binder) at 10,783 (Illinois Circuit Court, 1969).

Metowski v. *Traid Corp.*, 28 Cal. App.3d 332, 104 Cal. Rptr. 599 (1972).

Paley v. *Coca-Cola Co.*, 389 Mich. 983, 209 N.W.2d 232 (1973).

Horst v. *Guy*, 211 N.W.2d 723 (S. Ct. N.D. 1973).

Cooper v. *American Savings & Loan Assn.*, 127 Cal. Rptr. 579, 55 Cal. App.3d 274 (1976).

Shutts v. *Phillips Petroleum Co.*, 567 P.2d 1292 (S. Ct. Kan. 1977).

Van Vactor v. *Blue Cross Assoc.*, 50 Ill. App.3d 709, 365 N.E.2d 638 (1977).

Steinberg v. *Chicago Medical School*, 69 Ill.2d 320, 371 N.E.2d 634 (1977).

Nix v. *Northern Gas Producing Co.*, 222 Kan. 739, 567 P.2d 1322 (S. Ct. Kan. 1977).

Maddox v. *Gulf Oil Co.*, 222 Kan. 733, 567 P.2d 1326 (S. Ct. Kan. 1977).

Sterling v. *Superior Oil Co.*, 222 Kan. 737, 567 P.2d 1325 (S. Ct. Kan. 1977).

Frank v. *Teachers Insurance & Annuity Assoc.*, 71 Ill.2d 583, 376 N.E.2d 1377 (1978).

Schlosser v. *Allis-Chalmers Corp.*, 86 Wis.2d 226, 271 N.W.2d 879 (1978).

Gray v. *Amoco Production Co.*, 573 P.2d 1080 (S. Ct. Kan. 1978).

Sterling v. *Marathon Oil Co.*, 223 Kan. 686, 576 P.2d 635 (S. Ct. Kan. 1978).

Hoover v. *May Dept. Stores Co.*, 62 Ill.App.3d 106, 378 N.E.2d 762 (1978), *rev'd and remanded on other grds*, 77 Ill.2d 93, 395 N.E.2d 541 (1979).

Stern v. *Carter*, 97 Misc. 2d 775, 412 N.Y.S.2d 333 (S. Ct. Kings Cty, 1979).

Mercury Records Productions, Inc. v. *Economic Consultants, Inc.*, 91 Wis.2d 482, 283 N.W.2d 613 (1979).

Geelan v. *Pan American World Airways*, 441 N.Y.S. 474, 83 A.D.2d 538 (1980).

Clark v. *Harris*, 76 Ind. Dec. 767, 406 N.E.2d 646 (1980).

MULTI-STATE CLASS ACTIONS IN FEDERAL COURTS

Smith v. *Swormstedt,* 57 U.S. (16 How.) 288 (1853).

Supreme Tribe of Ben Hur v. *Cauble,* 255 U.S. 356 (1921).

Smith v. *Board of Pensions of the Methodist Church, Inc.,* 54 F. Supp. 224 (E.D. Mo. 1944).

Advertising Specialty National Association v. *Federal Trade Commission,* 238 F.2d 108 (1st Cir. 1956).

Calagaz v. *Calhoon,* 309 F.2d 248 (5th Cir. 1962).

Philadelphia Electric Company v. *Anaconda American Brass Co.,* 43 F.R.D. 452 (E.D. Pa. 1968).

State of West Virginia v. *Chas. Pfizer & Co.,* 440 F.2d 1079 (2d Cir. 1971).

Siegel v. *Chicken Delight, Inc.,* 448 F.2d 43 (9th Cir. 1971).

Research Corp. v. *Edward J. Funk & Sons, Co., Inc.,* 15 F.R.Serv. 2d 580 (N.D. Ind. 1971).

In re Antibiotic Antitrust Actions, 333 F.Supp. 299 (S.D. N.Y. 1971) *Mandamus denied sub nom., Pfizer, Inc.* v. *Lord,* 447 F.2d 122 (2d Cir. 1971).

Rivera v. *Chicken Delight, Inc.,* 17 F.R.Serv. 2d 473 (S.D. Tex. 1973).

Theriault v. *Carlson,* 353 F.Supp. 1061 (N.D. Ga. 1973).

Coburn v. *4-R Corp.,* 77 F.R.D. 43 (E.D. Ky., 1977).

Aznavorian v. *Califano,* 440 F.Supp. 788 (S.D. Cal. 1977), *rev'd on other grds.,* 439 U.S. 107 (1978).

In Re: Gap Stores Securities Litigation, 79 F.R.D. 283 (N.D. Cal. 1978).

In Re: "Agent Orange" Products Liability Litigation, 506 F.Supp. 762 (E.D. N.Y.), *rev'd on other grds,* 635 F.2d 987 (2d Cir. 1980).

United States v. *Will,* 449 U.S. 200 (1980).

McClure v. *Harris,* 503 F.Supp. 409 (N.D. Cal. 1980).

APPENDIX B

STATE CLASS ACTION STATUTES

Alabama:	Ala. R. Civ. P. 23.
Alaska:	Alaska R. Civ. P. 23.
Arizona:	Ariz. R. Civ. P. 23.
Arkansas:	Ark. R. Civ. P. 23-23.2.
California:	Cal. Code. Civ. Pro. §382.
Colorado:	Colo. R. Civ. P. 23.
Connecticut:	Ct. Gen. Stat. §52-104-105.
Delaware:	Del. Ch. R. 23.
District of Columbia:	D.C. R. Civ. P. 23-23-I.
Florida:	Fla. R. Civ. P. 1.220.
Georgia:	Ga. Code §81A-123.
Hawaii:	Hawaii R. Civ. P. 23.
Idaho:	Idaho R. Civ. P. 23.
Illinois:	Ill. Rev. Stat. Ch. 110 §57.2-7.
Indiana:	Ind. R. Tr. P. 23.
Iowa:	Iowa R. Civ. P. 42.
Kansas:	Kan. Stat. §60-223.
Kentucky:	Ky. R. Civ. P. 23.
Louisiana:	La. Code Civ. Pro. Art. 591.
Maine:	Me. R. Civ. P. 23.
Maryland:	Md. Code Rule 209.
Massachusetts:	Mass. R. Civ. P. 23.

Michigan:	Mi. Stat. Gen. Ct. Rule 208.
Minnesota:	Minn. R. Civ. P. 23.
Missouri:	Mo. Rev. Stat. §507.070.
Montana:	Mont. R. Civ. P. 23.
Nebraska:	Neb. Rev. Stat. §25-319.
Nevada:	Nev. R. Civ. P. 23.
New Hampshire:	Common Law
New Jersey:	N.J. Civ. Prac. Rule 4:32.
New Mexico:	N.M. Stat. §21-1-1, §21-6-1.
New York:	N.Y. Civ. Prac. Law §901-909.
North Carolina:	N.C. Gen. Stat. §1A-1 R. Civ. P. 23.
North Dakota:	N.D. R. Civ. P. 23.
Ohio:	Ohio R. Civ. P. 23.
Oklahoma:	12 OK Stat. Ann. §13-18.
Oregon:	Or. Rev. Stat. §§13.210-.410.
Pennsylvania:	Pa. Rule Civ. P. 1701-1716.
Rhode Island:	RI. R. Civ. P. 23.
South Carolina:	South Carolina Code §10-204.
Tennessee:	Tenn. R. Civ. P. 23.
Texas:	Tex. R. Civ. P. 42.
Utah:	Utah R. Civ. P. 23.
Vermont:	Vt. R. Civ. P. 23.
Washington:	Wash. Ct. Rules, Rule 23.
West Virginia:	W.V. R. Civ. P. 23.
Wisconsin:	Wis. Stat. §260.12.
Wyoming:	Wyo. R. Civ. P. 23.

Amicus Brief

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MOTION FILED
JUN 4 1982

No. 81-1493

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

THE GILLETTE COMPANY,
Petitioner,

v.

STEVEN MINER,
Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF ILLINOIS

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE ON BEHALF OF PLAINTIFFS IN THE "DALKON SHIELD" IUD PRODUCTS LIABILITY LITIGATION IN THE NORTHERN DISTRICT OF CALIFORNIA AND IN MDL-211 IN THE DISTRICT OF KANSAS IN SUPPORT OF PETITIONER

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No. 81-1493

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

THE GILLETTE COMPANY,

Petitioner,

v.

STEVEN MINER,

Respondent.

MOTION OF AMICI CURIAE PLAINTIFFS IN THE "DALKON SHIELD" IUD PRODUCTS LIABILITY LITIGATION IN THE NORTHERN DISTRICT OF CALIFORNIA AND IN MDL-211 FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

Amici are plaintiffs in the products liability litigation presently pending in the Northern District of California under the title *In re Northern District of California "Dalkon Shield" IUD Products Liability Litigation.** This brief is also filed on

* Thomas J. Brandi was designated by agreement among counsel for plaintiffs in the Dalkon Shield litigation in the Northern District of California to act as coordinating counsel for the California plaintiffs in the appeal of the class certification issue to the Ninth Circuit Court of Appeals. By agreement of counsel, this brief is filed on behalf of those plaintiffs and of the non-resident plaintiffs affected by the class certification order presently on appeal.

Bradley Post is lead and liaison counsel for plaintiffs in the MDL-211 litigation pending before the United States District Court for the District of Kansas.

behalf of plaintiffs in the Multi-District Litigation Docket No. 211 (MDL-211) pending in the District of Kansas under the title *In re A.H. Robins Co., Inc., "Dalkon Shield" IUD Products Liability Litigation.* Pursuant to Supreme Court Rule 36.1, *amici* move for leave to file the accompanying brief *amicus curiae* in this case.

Amici are representatives of some 1,500 women nationwide who have asserted claims for punitive damages against A.H. Robins Co., manufacturer of the Dalkon Shield, for injuries caused by use of the Dalkon Shield. The claims asserted by these plaintiffs are pending in state and federal courts throughout the country. About 165 cases are pending before Judge Spencer Williams in the United States District Court for the Northern District of California. In June 1981, Judge Williams, on his own motion and over the objection of plaintiffs, undertook to dispose of the punitive damage issue in its entirety by certifying a nationwide class of all persons who have asserted punitive damage claims against Robins. *In re Northern District of California "Dalkon Shield" IUD Products Liability Litigation,* 521 F.Supp. 1188 (N.D.Cal. 1981). Defendant Robins concurred in the certification of such a nationwide class and on November 5, 1981, Judge Williams entered a Memorandum of Opinion and Order elaborating the basis for certification of the nationwide class. *In re Northern District of California "Dalkon Shield" IUD Products Liability Litigation,* 526 F.Supp. 887 (N.D.Cal. 1981).

The District Court certified the question of certification of a nationwide plaintiff class to the Ninth Circuit Court of Appeals under 28 U.S.C. §1292(b). The case has been briefed and argued and is presently awaiting decision.

The interest of *amici* in this case arises from the fact that the class certification in the Dalkon Shield case is substantially similar to the issue presented in the instant case. Both the Illinois Supreme Court in this case and the Northern District of California in the Dalkon Shield case held that the "minimum contacts" test of *International Shoe Co.* v. *Washington,* 326 U.S. 310 (1945) does not apply to plaintiffs in a class action. Both courts concluded that they could exercise jurisdiction over

claims of non-resident plaintiffs provided only that there was notice and adequate representation of the class—so-called "procedural due process".

Amici submit that the parties to this proceeding will not adequately represent the interests of plaintiffs who oppose class certification. In the instant case, the consumer plaintiffs sought certification of a nationwide class and it is the defendant, Gillette Company, which raises the objection of lack of jurisdiction over non-resident plaintiffs. The associations of insurance companies that have filed an amicus brief in support of petitioner Gillette also approach the jurisdictional problem from a defendant's perspective.

In the Dalkon Shield case it is the defendant manufacturer who has sought class certification. The injured plaintiffs have almost unanimously resisted it as an unconstitutional interference with their right to pursue their own individual actions, in forums of their own choosing, represented by their own counsel. *Amici* believe that they will present arguments against the exercise of jurisdiction over non-resident class members in the absence of minimum contacts that will not be presented in the same form either by the parties to this action or by other *amici*.

Amici have sought the consent of counsel for petitioners, H. Blair White, and counsel for respondent, Robert Atkins, for leave to file the accompanying brief. Counsel for respondent denied this request.

For the foregoing reasons, *amici* plaintiffs in the Dalkon Shield IUD Products Liability Litigation in the Northern District of California and in MDL-211 pray that this court grant their motion for leave to file the accompanying brief in support of petitioner.

Respectfully submitted,

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Dated: June 4, 1982

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OTHER AUTHORITIES

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No. 81-1493

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

THE GILLETTE COMPANY,

Petitioner,

v.

STEVEN MINER,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

BRIEF AMICUS CURIAE ON BEHALF OF PLAINTIFFS IN THE "DALKON SHIELD" IUD PRODUCTS LIABILITY LITIGATION IN THE NORTHERN DISTRICT OF CALIFORNIA AND IN MDL-211 IN THE DISTRICT OF KANSAS IN SUPPORT OF PETITIONER

INTEREST OF *AMICI*

Amici are plaintiffs who have sued A. H. Robins Co., manufacturer of an intrauterine device known as the Dalkon Shield, for punitive damages based on injuries caused by the Dalkon Shield. *Amici* submit this brief on behalf of more than 1,500 women who have asserted punitive damage claims against the manufacturer of the Dalkon Shield in state and federal courts throughout the country. All of these cases arise under state law.

About 165 Dalkon Shield cases are pending before Judge Spencer Williams in the United States District Court for the Northern District of California. In June 1981, Judge Williams, acting on his own motion and over the objection of plaintiffs, certified a class consisting of all persons asserting punitive damage claims in state and federal courts nationwide against A. H. Robins Co. based on injuries caused by the Dalkon Shield. Defendant Robins concurred in certification of a nationwide class as to punitive damages and in November 1981, Judge Williams issued a further Memorandum of Opinion and Order elaborating the basis of the decision. *In re Northern District of California "Dalkon Shield" IUD Products Liability Litigation,* 526 F.Supp. 887 (N.D.Cal. 1981).

The District Court recognized that the class consisted principally of non-resident plaintiffs whose claims had no connection whatever with California. To sustain the exercise of jurisdiction over the rights of non-resident plaintiffs, the District Court asserted that the "minimum contacts" test of *International Shoe* applies only to non-resident defendants but has no application to non-resident members of a plaintiff class, provided only that the class is adequately represented. 526 F.Supp. at 905. The District Court certified the question of class certification of a nationwide class to the Ninth Circuit Court of Appeal for interlocutory review under 28 U.S.C. §1292(b). The case has been briefed and argued in the Ninth Circuit and is presently awaiting decision.

The issue in the Dalkon Shield case is substantially similar to the issue presented in the instant case. Both the Illinois Supreme Court in this case and the Northern District of California in the Dalkon Shield case held that the "minimum contacts" test of *International Shoe Co.* v. *Washington,* 326 U.S. 310 (1945) does not apply to non-resident plaintiffs in a class action, even where the claims of the non-resident plaintiffs arise under the substantive law of numerous states other than the forum state. Both courts concluded that they could exercise jurisdiction over claims of non-resident plaintiffs so long as there was notice and adequate representation of the class, adopting the so-called "procedural due process" standard

enunciated by the Kansas Supreme Court in *Shutts* v. *Phillips Petroleum Co.*, 222 Kan. 527, 567 P.2d 1292 (1977), *cert. denied*, 434 U.S. 1068 (1978).

Because the instant case involves the question of jurisdiction over non-resident members of a plaintiff class whose claims arise under state law, the outcome of this case may well have a major impact on that same issue in the Dalkon Shield case. However the situations of the plaintiffs in the two cases are vastly dissimilar. While *Amici* generally support petitioner Gillette Co. in opposing jurisdiction over non-resident class members having no contact with the forum, nevertheless *Amici* feel it important that this opposition be presented from the viewpoint of plaintiffs interested in protecting their own substantial rights, rather than from the viewpoint of a defendant interested principally in restricting the number of claims against it.

Accordingly, *Amici* ask that the Court, while dealing with the consumer fraud case at bar, be mindful of the very different jurisdictional considerations which may be presented in other types of class actions. In *Gillette*, plaintiffs seek class certification; in the Dalkon Shield case, defendant sought class certification and plaintiffs resisted it. In *Gillette* the plaintiffs have the right to opt out; in the Dalkon Shield case the court certified the class under Federal Rule of Civil Procedure 23(b)(1)(B) to preclude the possibility of opting out. In *Gillette* the individual claims amount to approximately $7 per person, too small an amount to support individual litigation; in the Dalkon Shield case the personal injuries suffered by individual women are extremely substantial in both human and monetary terms.[1] The Dalkon Shield plaintiffs have already filed nearly 6,000 claims of which more than 4,000 have been settled. At present more than 1,500 individual suits to recover for the injuries are pending in state and federal courts throughout the country in which plaintiffs are represented by counsel of their own choo-

[1] The injuries alleged range from pelvic inflammatory disease to death of users and fetuses, and include permanent sterility, birth of deformed and brain damaged children and many lesser injuries. The lives and health of individuals and families were permanently affected.

sing. For the most part, the claims have been filed in courts of the state in which the plaintiff resides, purchased and used the product, and suffered injury. Punitive damages under the law of each individual state are an integral part of each claim.

In *Gillette* the issues of causation and damages are substantially the same for all plaintiffs; in the Dalkon Shield case the issues of causation and damages are unique to each plaintiff and will require individual litigation in any event, so that an expansion of jurisdiction will not promote judicial economy. Lastly, while *Gillette* threatens some interference with the sovereignty of other states to the extent that Illinois courts would have to interpret and apply the consumer fraud law of other states, it does not appear that Illinois' exercise of jurisdiction over non-resident purchasers would interfere with cases already pending in the courts of other states. In the Dalkon Shield case, exercise of jurisdiction over non-resident class members interferes with cases in other states in every instance—most of which were filed years before the District Court in California issued its class certification order.

SUMMARY OF ARGUMENT

The court below held that it could exercise jurisdiction over non-resident members of a plaintiff class, even in the absence of minimum contacts, so long as they received prior notice and adequate representation. The court concluded that while "minimum contacts" are required for jurisdiction over defendants, "procedural due process" is sufficient for jurisdiction over plaintiff classes.

The practical aspects of a consumer case such as this provide a temptation to make exceptions to traditional jurisdictional rules. The holding below was in the context of a consumer class action involving some 180,000 consumers nationwide, with claims of approximately $7 apiece, and where each plaintiff had the opportunity to opt out of the class.

Nevertheless *Amici* submit that the exercise of jurisdiction over non-residents having no contact with the forum is improper and must be reversed.

Any impression that the territorial requirements of the "minimum contacts" test had been replaced by general considerations of "fairness" or "convenience" has been forcefully and repeatedly dispelled by this Court in a series of cases, beginning with *Hansen* v. *Denckla,* 357 U.S. 235 (1958) and continuing through *World-Wide Volkswagen Corp.* v. *Woodson,* 444 U.S. 286 (1980), which have emphasized the indispensibility of purposeful contacts between the party over whom jurisdiction is to be exercised and the forum state.

The minimum contacts test applies to anyone, plaintiff or defendant, whose substantive rights will be adjudicated without his or her affirmative consent. The same principle adopted by the court below to adjudicate the $7 claims of consumers has been adopted by the Northern District of California in the Dalkon Shield litigation to assert exclusive jurisdiction over the punitive damage claims of over 1,500 plaintiffs in 46 states, with injuries ranging from pelvic inflammatory disease to deformed and brain damaged children caused by the Dalkon Shield. The principle that both those courts adopted, that plaintiffs can be subjected to jurisdiction against their will by a forum with which they have no contacts, ties or connections of any kind is, however, an insidious undermining of due process.

A class action is only a procedural device which does not enlarge the territorial jurisdiction of a state or federal court. It is not a device that may be used to circumvent the due process rights of litigants in the name of judicial economy.

The rule adopted by the court below improperly interferes with the sovereignty of the states in which plaintiffs reside and whose substantive law governs the plaintiffs' claims. Under

principles of federalism embodied in the "minimum contacts" test, a court in one state may not appropriate to itself the right to adjudicate matters arising under the law of another state in the absence of some affiliating jurisdictional nexus. A judicial interpretation which encourages nationwide class actions based on claims arising under the laws of individual states invites conflicts between the courts of various states and invites both plaintiffs and defendants to engage in the most blatant forum shopping.

The rule adopted by the court below and by the Northern District of California in the Dalkon Shield litigation, would authorize the courts of one state to interfere in litigation already pending in the courts of other states. At the very least, the situation of a single court attempting to apply the laws of numerous other jurisdictions invites conflicting interpretations on the one hand, and efforts to create a "general common law" on the other, neither of which is appropriate.

While the problems presented by large numbers of consumer claims for nominal damages, too small to be litigated individually, create pressure to devise new procedural solutions, the fundamental requirements of due process must be preserved. The class action is not a substitute for an act of Congress creating a federal law of consumer fraud or products liability with authorization for nationwide service of process.

While reasons of policy may urge a more lenient jurisdictional rule in consumer fraud cases, they must be sharply distinguished from other forms of litigation, particularly personal injury claims based on product liability, where the claims involved are substantial and are normally litigated in the jurisdictions where they arise, and where plaintiffs are represented by counsel of their own choosing. Any rule which would permit the class action to be used as a device to subject such plaintiffs to jurisdiction in a forum with which they have no contacts or connections would violate both due process and principles of federalism.

ARGUMENT

I.

DUE PROCESS AND PRINCIPLES OF FEDERALISM PRECLUDE THE COURT FROM EXERCISING JURISDICTION OVER NON-RESIDENT MEMBERS OF A PLAINTIFF CLASS WHO LACK MINIMUM CONTACTS WITH THE FORUM, WHOSE CLAIMS ARISE UNDER THE LAWS OF OTHER STATES, AND WHO HAVE NOT INDIVIDUALLY SOUGHT TO INVOKE THE JURISDICTION OF THE COURT.

A. The "Minimum Contacts" Test Applies To The Exercise Of Jurisdiction Over All Parties Whose Substantial Rights Will Be Affected, Plaintiffs As Well As Defendants.

It is undisputed in this case, and in the Dalkon Shield cases, that most of the non-resident parties over whom the court purports to exercise jurisdiction by certification of a nationwide plaintiff class are non-residents having no contacts or connections whatever with the forum state and whose claims have no connection with the forum state. To escape the inevitable limit on jurisdiction which this lack of contacts mandates, the Illinois Supreme Court simply asserts that the "minimum contacts" test of *International Shoe Co.* v. *Washington,* 326 U.S. 310, 316 (1945), does not apply to exercises of jurisdiction over absent plaintiffs in a class action. (Cert. App. pp. A3-A4.)

This proposition simply will not withstand scrutiny. As pointed out by the dissenters in the court below, the holding will affect the substantial rights of absent plaintiffs by "depriving these absent class members of the right to litigate their claims in the courts of their own States." (Cert. App. p. A-14.) The purpose of the "minimum contacts" test is to limit the power of courts to affect the substantial rights of parties in the absence of some recognized jurisdictional nexus between the party and the forum, absent voluntary appearance. As this Court said in *Shaffer* v. *Heitner:*

> The standard for determining whether an exercise of jurisdiction over the interests of persons is consistent with

the Due Process Clause is the minimum contacts standard elucidated in *International Shoe.* 433 U.S. 186, 207 (1977).

Since certification of a plaintiff class materially affects the rights of non-resident class members, the issue of jurisdiction is substantially the same as if the absentees were defendants.

In *Gillette,* plaintiff Miner sought certification of a nationwide plaintiff class, while in the Dalkon Shield case, defendant sought certification of a nationwide plaintiff class. Neither of these situations should be allowed to adversely affect the jurisdictional rights of absent non-residents without minimum contacts. The fact that a plaintiff seeks to bring in other non-resident plaintiffs, potential or actual, cannot be distinguished from a situation where a defendant seeks to certify a nationwide plaintiff class. In both instances the absentees must be viewed as defendants for purposes of jurisdictional analysis because they are being involuntarily subjected to jurisdiction.

Nor should jurisdiction be premised on the failure of plaintiffs to opt out. Failure to opt out of a class action is a far cry from consent to jurisdiction. This jurisdictional defect is more strikingly apparent when absentee class members are not given the opportunity to opt out. In the Dalkon Shield case, for example, the District Court certified the class under Federal Rule of Civil Procedure 23(b)(2) for the express purpose of precluding plaintiffs from opting out of the class.

The importance of the claim which will be affected must also be considered in determining whether the exercise of jurisdiction is consistent with "traditional notions of fair play and substantial justice." *International Shoe Co.* v. *Washington,* 326 U.S. at 316. In consumer fraud cases such as *Gillette,* where individual plaintiffs have suffered only nominal injuries, the interest of an individual plaintiff in protecting his individual right to sue is far less substantial than in personal injury cases where the claims of plaintiffs run from tens of thousands to hundreds of thousands of dollars. While monetary value is not the only measure of the constitutional value of plaintiff's right to choose his own forum, the amount of the claim does have

constitutional significance. Where plaintiff's claim is substantial, she cannot be compelled to have that claim adjudicated in a forum not of her choosing, absent the recognized jurisdictional nexus that this Court has expressed as "minimum contacts."

In short, a court cannot exercise jurisdiction over any party against his or her will—plaintiff or defendant—unless that person has such minimum contacts with the forum that the exercise of jurisdiction is fair and reasonable.

B. A Class Action Is Only A Procedural Device. It Does Not Expand The Power Of A Court Over Non-Residents, Absent A Recognized Nexus Of Jurisdiction Between The Absentee And The Forum.

The court below, and the District Court in the Dalkon Shield case, both held that in a class action it is only necessary that the court have personal jurisdiction over the representative parties in order to exercise jurisdiction over non-resident class members, at least where a plaintiff class is concerned. (Cert. App. A3-A4; 526 F.Supp. at 906-907.) Both courts based their holding on a strained interpretation of fragmentary language in *Hansberry* v. *Lee,* 311 U.S. 32 (1940) suggesting that absent class members may be bound, even though "not within the jurisdiction" provided their interests are adequately represented in a class action.

Without entering into a detailed textual analysis of *Hansberry,* it is sufficient to point out that it held only that a judgment in a properly constituted class action is binding upon class members who were neither named as parties nor served with process, provided there was appropriate notice and adequate representation. *Hansberry* simply held that a class action could bind class members who were not named as parties or served with process. It did not hold that a class action could be used as a device to adjudicate the rights of persons having no jurisdictional nexus with the forum.

Hansberry did not involve a multi-state class and said absolutely nothing about jurisdiction over non-resident class members having no connection with the forum. *Hansberry* did, however, say that even if a class is properly constituted, a class member is not bound *unless* there has been adequate representation of his interests. The court held that Hansberry, a

black purchaser of land subject to a racially restrictive covenant, was not bound by a judgment in an earlier action brought by property owners, including Hansberry's predecessor in title, to enforce the racially restrictive covenant. The *Hansberry* opinion does contain a single ambiguous phrase, clearly dictum, where this Court noted, as an example, that class treatment might be appropriate "because some [of the class members] are not within the jurisdiction or because their whereabouts are unknown . . . ." 311 U.S. at 41-42. There certainly are situations, such as the common fund cases[2] where courts have traditionally exercised jurisdiction over the interests of non-residents in an actual fund located within the forum. But nothing in *Hansberry* indicates that it was intended to authorize a nationwide class of tort claims, or even consumer claims arising independently throughout the country.

In *Hansberry*, this Court noted that the class action was an exception to the normal requirements of due process, but the Court also noted that the extent of this exception was "not precisely defined by judicial opinion." 311 U.S. at 41. There is nothing in *Hansberry* or any subsequent case to indicate that the innocent dictum referred to above was intended to authorize a state or federal court to use the class action as a vehicle for overriding the traditional rules of jurisdiction, i.e., to exercise jurisdiction over tort claims arising under the laws of other states where the plaintiffs have no contacts, connections or ties whatever with the forum state. This dictum is hardly an adequate basis for ignoring the series of cases, beginning with *Hanson* v. *Denckla*, 357 U.S. 235 (1958), in which this Court has emphasized the indispensability of purposeful contacts between the party over whom jurisdiction is to be exercised and the forum state. *Shaffer* v. *Heitner*, 433 U.S. 186 (1977); *Kulko* v. *Superior Court*, 436 U.S. 84 (1978); *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286 (1980); and *Rush* v. *Savchuk*, 444 U.S. 320 (1980).

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[2] E.g., *Hartford Life Insurance Co.* v. *Ibs*, 237 U.S. 662 (1915); *Supreme Council of the Royal Arcanum* v. *Green*, 237 U.S. 531 (1915); *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U.S. 356 (1921); and *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). Cf. *Shutts* v. *Phillips Petroleum Co.*, 222 Kan. 527, 567 P.2d 1292 (1977), *cert. denied*, 434 U.S. 1068 (1978) (non-resident plaintiffs with claims to a fund consisting of royalties derived from gas leases having a substantial connection with the forum state held subject to jurisdiction).

Jurisdiction over a multi-state plaintiff class requires some nexus of jurisdiction, such as a common fund within the state,[3] a federal statute authorizing nationwide jurisdiction,[4] or claims based on a tort which occurred within the forum state.[5] None of these situations is remotely analagous to the exercise of jurisdiction attempted by the Illinois Supreme Court in the instant case or by the District Court in the Dalkon Shield litigation. None of the cases support the exercise of jurisdiction over non-resident members of a plaintiff class who lack minimum contacts with the forum, whose claims arise under the laws of other states, and who have not personally sought to invoke the jurisdiction of the court.

C. The Concept Of "Procedural Due Process" Posited As A Basis For Jurisdiction Over Non-Resident Plaintiffs In *Shutts* v. *Phillips Petroleum Co.*, Even If Valid In That Case, Is Inapplicable To Sustain Jurisdiction Over Non-Resident Class Members In The Instant Case.

The court below cited, without discussing the facts, the decision of the Kansas Supreme Court in *Shutts* v. *Phillips Petroleum Co.*, 222 Kan. 527, 567 P.2d 1292 (1977), to support its position that non-resident plaintiffs may be bound, even in the absence of minimum contacts, so long as they receive prior notice and adequate representation. (Cert. App. pp. A3-A5.)

Shutts was a class action by a Kansas plaintiff on behalf of a multi-state class of 6,400 gas royalty owners holding leases with Phillips Petroleum Co., an Oklahoma corporation, for wells in an area encompassing all of Kansas and parts of Texas and Oklahoma, known as the Hugoton-Anadarko area. The purpose of the suit was to force Phillips to pay interest on certain royalties which it had held in suspense for over ten years. At the time the action was brought in Kansas, the statute

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[3] See cases cited in note 2, *supra*.

[4] E.g., *In re Gap Securities Litigation*, 79 F.R.D. 283 (N.D.Cal. 1978).

[5] E.g., *Coburn* v. *4-R Corp.*, 77 F.R.D. 43 (E.D.Ky. 1977), mandamus denied sub nom. *Union Light, Heat & Power Co.* v. *United States District Court*, 588 F.2d 543 (6th Cir. 1978), appeal dismissed, 443 U.S. 913 (1979) (plaintiffs' claims arose out of a fire in a supper club); *In re Federal Skywalk Cases*, No. 81-0753-CV-W-3 (W.D.Mo., January 25, 1982) (appeal noted February 9, 1982). (plaintiffs' claims arose out of the collapse of elevated walkways in the Hyatt Hotel in Kansas City).

of limitations had already run in Texas and Oklahoma. 567 P.2d at 1307. There, as here, defendant objected to certification of a multi-state plaintiff class. In upholding class certification, the Kansas Supreme Court found that the case was "closely analogous" to the common fund cases which it reviewed in detail. 567 P.2d at 1311. Unfortunately, the portion of the opinion which drew the greatest attention from commentators was the court's endorsement of a jurisdictional proposition far broader than the facts of the *Shutts* case, namely:

> What is important is that the non-resident plaintiffs *be given notice and an opportunity to be heard and that their rights be justly protected by adequate representation* .... Therefore, while the essential element necessary to establish jurisdiction over non-resident defendants is some 'minimum contacts' between the defendant and the forum state, *the element necessary to the exercise of jurisdiction over non-resident plaintiff class members is procedural due process.* 567 P.2d at 1305 (emphasis in the original).

However, the court was also at some pains to point out that it did not view "procedural due process" as a rule of general applicability with respect to plaintiff classes:

> ... [T]his opinion should not be read as an invitation to file nationwide class action suits in Kansas .... Concepts of manageability in terms of our Kansas class action statute, the nature of the controversy, and the relief sought, the interest of Kansas in having the matter determined, and the class size and complexity will have to be applied .... A court should also give careful consideration, as we have attempted to do, to any possible conflict of law problems. When liability is to be determined according to varying and inconsistent state laws, the common question of law or fact prerequisite ... will not be fulfilled. 567 P.2d at 1314.

Shutts is distinguishable from the instant case in that all plaintiffs claimed an interest in a royalty fund which had a significant connection with the forum state; no alternative

forums were available; and the conflict of law problems were manageable because the court was required to interpret the law of only two other states.

The court below, and the Dalkon Shield court, also cited *Schloss* v. *Allis-Chalmers Corp.*, 86 Wis.2d 226, 271 N.W.2d 879 (1978) as approving "procedural due process" rather than "minimum contacts" as the appropriate test for jurisdiction over non-resident plaintiffs. The language of *Schloss* also is much broader than the facts and actual holding of the case. *Schloss* involved a class action on behalf of retired salaried employees of Allis-Chalmers Corp. for failure to provide certain retirement benefits. The suit was brought as a class action in Wisconsin, where the defendant company was headquartered, on behalf of employees nationwide. All identifiable class members received individual notice and an opportunity to opt out. In affirming the trial court's certification of a plaintiff class that included non-residents, the Wisconsin Supreme Court held that all the retirement contracts were governed by Wisconsin law. The court also held, without any extensive analysis, that Wisconsin could exercise jurisdiction over non-resident members of the plaintiff class. In so doing, the court stated that it was relying on the *Shutts* rationale that "minimum contacts" applies to defendants and that "the due process requirements for the exercise of such power over unnamed non-resident plaintiffs are adequate notice and representation." 271 N.W.2d at 886.

On the facts of *Schloss* it seems evident that the court could just as well have upheld jurisdiction over non-resident members of the plaintiff class on the ground that the employer-employee relationship and the need for uniform interpretation of the company's retirement benefits provided sufficient "contacts" between the non-resident retirees and the forum to uphold jurisdiction, particularly in light of the fact that the class members were given the opportunity to opt out. Clearly the *Schloss* case provides no precedent for Illinois' exercise of jurisdiction over non-residents whose claims have no connection whatever with Illinois.

The better-reasoned decisions have held that jurisdiction over a class of non-resident plaintiffs is governed by the "minimum contacts" test of *International Shoe*. In *Feldman* v.

Bates Mfg. Co., 143 N.J.Super. 84, 362 A.2d 1177 (App.Div. 1976), a New Jersey stockholder brought suit on behalf of a multi-state class of 294 shareholders to compel the defendant corporation to extend the conversion date for certain stocks. The corporation was not qualified to do business in New Jersey, had no assets in New Jersey, and only 31 shareholders were New Jersey residents. The Appellate Division of the Superior Court held there was no basis on which New Jersey could exercise jurisdiction over non-resident members of the plaintiff class, saying:

> It is clear from the above that in those cases [the common fund cases] where extra-territorial binding effect has been accorded a state court class action, there was some "foothold" of jurisdiction in the forum state. No such factor is present in this case. There is no fund in New Jersey. Bates is a corporation of the State of Delaware and indeed is not even authorized to do business in this State. New Jersey has no special interest in supervising the conduct of Bates' business. Finally, the nonresident stockholders have no contacts with New Jersey which would warrant the exercise of jurisdiction over them by a court of this State. 362 A.2d at 1181.

D. A Concern For Judicial Economy And For Avoiding Multiple Litigation Is Not An Independent Basis For Exercising Jurisdiction.

This Court has made clear that considerations of convenience or judicial economy are not, of themselves, a basis for the exercise of personal jurisdiction over non-resident parties. In *World-Wide Volkswagen* v. *Woodson*, 444 U.S. 286 (1980), this Court reemphasized that the existence of some "minimum contacts", some "affiliating circumstances" between the party and the forum state are an indispensable prerequisite to the exercise of jurisdiction. A desire to avoid multiple litigation is simply not a substitute for due process, even where a class action, with its limited exceptions to the requirements of due process, is involved.

II.

THE EXERCISE OF JURISDICTION OVER NON-RESIDENT PLAINTIFFS HAVING NO CONNECTION WITH THE FORUM, AS TO CLAIMS GOVERNED BY THE SUBSTANTIVE LAW OF OTHER STATES, INTERFERES WITH THE SOVEREIGNTY OF OTHER STATES IN VIOLATION OF THE PRINCIPLES OF FEDERALISM EMBODIED IN THE CONSTITUTION.

In *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286 (1980), this Court emphasized that "the principles of interstate federalism embodied in the Constitution" preclude the courts of one state from interfering with the sovereignty of a sister state:

> . . . [T]he Framers also intended that the States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their own courts. The sovereignty of each State, in turn, implied a limitation on the sovereignty of all of its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment. 444 U.S. at 293.

A. The Decision Below Invites Jurisdictional Conflicts Between Courts Of Different States And Promotes Forum Shopping.

To permit the courts of any state to exercise nationwide jurisdiction over claims arising under the laws of other states and having no connection with the forum state poses a threat to the states as distinct legal-political entities. See Note, *Multi-State Plaintiff Class Actions: Jurisdiction and Certification*, 92 Harv.L.Rev. 718, 733 (1979). If a court in Illinois or California can exercise such jurisdiction by the simple device of declaring a nationwide class, there is nothing to prevent a court in Arkansas or North Carolina or New York from doing the same thing at the same time. On the one hand this would lead to jurisdictional conflicts among the states. On the other hand it would encourage litigants to engage in the most obnoxious kind

of forum shopping, with both plaintiff and defendant searching for a "favorable forum" in which to consolidate all consumer fraud or product liability claims.

A class action simply cannot be used as a substitute for an Act of Congress creating a federal law of consumer fraud or products liability, and authorizing nationwide service of process.

The decision below is particularly inimical to State sovereignty when a court certifies a class action that encompasses claims already in litigation in other states, as is the situation in the Dalkon Shield case. This leads to the kind of irresolvable jurisdictional conflict among the states that the "minimum contacts" test is expressly intended to avoid. See *World-Wide Volkswagen* v. *Woodson*, 444 U.S. 286, 291-92 (1980) ("minimum contacts . . . acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as co-equal sovereigns in a federal system.").

B. Nationwide Jurisdiction Deprives Non-Resident Plaintiffs Of The Right To Have Their Claims Adjudicated Under The Law Of The State Where The Claims Arose.

As the Second Circuit Court of Appeals recently observed:

> It is in the nature of a federal system that different states will apply different rules of law, based on their individual perceptions of what is in the best interests of their citizens. *In re "Agent Orange" Product Liability Litigation*, 635 F.2d 987 (2d Cir. 1980), *cert. denied*, sub nom. *Chapman* v. *Dow Chemical Co.*, 101 S.Ct. 3105 (1981).

The instant case involves consumer fraud claims arising under the substantive law of 50 jurisdictions. When a forum state undertakes the task of interpreting and applying the law of other states, there is no way to insure that it will reach the same result that would be reached by the courts of the plaintiffs' residence. The potential for conflicts and confusion created by this situation is well argued by the *amici* insurance associations

at pages 6-9 of their brief. The problem increases exponentially as the number of jurisdictions involved increases, which in turn erodes the fundamental fairness which must underlie any exercise of jurisdiction over a non-resident.

When confronted with the problem of interpreting the law of a large number of other states, the forum court will almost inevitably attempt to simplify the problem either by attempting to group the laws of various states and deal with them in "batches", as the court below did (Cert. App. pp. A8-A9), or it will seek to apply the law of the forum, as the District Court did in the Dalkon Shield case (526 F.Supp. at 916). Either of these courses of action suggests creation of something closely akin to a "general common law" which no court has the power to do, however convenient it might be. *Erie Railroad Co.* v. *Tompkins,* 314 U.S. 64 (1938). Certification of a nationwide class thus deprives non-resident plaintiffs of the right to the application of their own law, a benefit of federalism secured to them, ultimately, by the doctrine of minimum contacts as a limit on state court jurisdiction.

> The concept of minimum contacts . . . can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to insure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as co-equal sovereigns in a federal system. *World-Wide Volkswagen Corp.* v. *Woodson,* 444 U.S. 286, 291-92 (1980).

CONCLUSION

For the foregoing reasons, *amici* plaintiffs in the Dalkon Shield litigation and MDL-211 respectfully submit that the judgment of the Illinois Supreme Court should be reversed in so far as it denies petitioner's motion to dismiss claims of non-resident class members for lack of jurisdiction.

Respectfully submitted,

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Dated: June 4, 1982

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Office-Supreme Court, U.S.
FILED
AUG 7 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1493

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Pandick Press Midwest, Inc., Chicago • 454-7600

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IN THE

Supreme Court of the United States

OCTOBER TERM 1981

THE GILLETTE COMPANY,

Petitioner,

v.

STEVEN MINER,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF ILLINOIS

BRIEF OF AMICI CURIAE TYRONE C. FAHNER, ATTORNEY GENERAL OF ILLINOIS, BRONSON C. LaFOLLETTE, ATTORNEY GENERAL OF WISCONSIN, BILL ALLAIN, ATTORNEY GENERAL OF MISSISSIPPI, JOHN J. EASTON, JR., ATTORNEY GENERAL OF VERMONT, WILLIAM M. LEECH, JR., ATTORNEY GENERAL OF TENNESSEE, JIM SMITH, ATTORNEY GENERAL OF FLORIDA, ROBERT K. CORBIN, ATTORNEY GENERAL OF ARIZONA, AND MARK WHITE, ATTORNEY GENERAL OF TEXAS, IN SUPPORT OF RESPONDENT

INTEREST OF AMICI CURIAE

As the chief legal officer of the State of Illinois, Attorney General Tyrone C. Fahner has among his many duties the prosecution of alleged consumer fraud. Similarly, the state Attorneys General across the country are charged with the responsibility of first containing and then eliminating unlawful business practices in their states. Due to the ever-increasing amount of fraud and the ever-decreasing amount of public funds with which to combat the problem, not every consumer abuse is addressed.

One example of consumer abuse frequently left unremedied involves the loss of small dollar amounts by thousands of individuals residing in the several states. Cumulatively, those perpetrating such abuse thrive and profit greatly, secure that only a rare consumer or governmental agency will institute suit over a few dollars. In order to effectively prosecute this kind of consumer fraud, both the private bar and the state Attorneys General need the option of prosecuting multi-state class actions. If those most interested in consumer protection are denied the tool of a nationwide class, then wronged consumers will be deprived of a forum.

The interest of *Amici Curiae* is a simple one: concern that if Petitioner prevails the rights of consumers across the country will suffer. More specifically, *Amici* are convinced that it is in the best interest of all consumers—Illinois and non-Illinois residents alike—that alleged fraud, no matter how small or how ingenious, be pursued effectively. The most effective weapon in this area is the national class action. Individuals simply will not sue to recover $7.95, particularly when the filing fees for even small claims courts exceed the amount of actual damages. Moreover, the federal courts are now effectively foreclosed as a forum; only state courts remain. Nothing in the United States Constitution or otherwise bars the maintenance of a nationwide class action in a state court.

The Attorney General of Illinois, as well as the other Attorneys General who join in this brief, urge the retention of the multi-state class action stratagem to counter consumer fraud and deceptive practices. Thus, *Amici Curiae* respectfully submit this brief in support of Respondent Steven Miner.

SUMMARY OF ARGUMENT

It has long been recognized that a state court judgment in a proper class action will be binding on all class members—including resident and non-resident members alike. Decisions of the Supreme Court, restricting access to federal courts for class actions when claims of individual members are under $10,000 each, have caused litigants similarly situated to turn more frequently to state forums to redress their common grievances. Due process considerations are satisfied in multi-state class actions if non-resident plaintiffs are afforded notice, an opportunity for exclusion, and adequate representation. Further, state courts do not violate principles of federalism by refusing to foreclose a forum to non-resident plaintiffs. The national marketplace is such that unscrupulous businesses are now able to defraud small dollar amounts from millions of consumers residing throughtout the country. The multi-state class action is the most effective method, and often the only method, of combatting that problem. Consequently, the Supreme Court should retain the national class action device.

ARGUMENT

I. THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT DOES NOT PROHIBIT A STATE COURT FROM RENDERING A JUDGMENT BINDING ON NON-RESIDENT PLAINTIFFS IN A CLASS ACTION.

The due process clause of the Fourteenth Amendment limits the ability of state courts to assert personal jurisdiction over defendants who do not reside within the territorial boundaries of the state. State courts are required to apply "traditional notions of fairness and substantial justice" when compelling non-resident defendants to appear and defend within its boundaries. *International Shoe Co.* v. *Washington,* 326 U. S. 310, 316 (1945). In order to assert personal jurisdiction over a non-resident defendant, the forum state must have some "minimum contacts" with the state. *International Shoe Co.* v. *Washington,* 326 U. S. at 316.

Tests of territorial jurisdictional limits over defendants are inapplicable to non-resident plaintiffs and need not be satisfied in order for a state court to render a binding judgment. *Shutts* v. *Phillips Petroleum Co.,* 222 Kan. 527, 567 P. 2d 1292 (1977), *cert. den.,* 434 U. S. 1068 (1978); *Schlosser* v. *Allis-Chalmers Corp.,* 86 Wis. 2d 226, 271 N. W. 2d 879 (1978). Generally, any non-resident may initiate suit in a state court as plaintiff. The non-resident plaintiff need not satisfy jurisdictional "minimum contacts" to become a plaintiff. In a multi-state class action commenced in a state court, non-resident plaintiffs could theoretically file individual suits against a common defendant. No questions of "due process" or "minimum contacts" would arise.

This Court has long recognized the ability of a state court to render a judgment binding on non-resident plaintiff class members. In *Royal Arcanum* v. *Green,* 237 U. S. 531 (1914), the plaintiff brought suit in a New York state court against a

fraternal organization to enjoin the organization from changing its monthly assessment and from suspending the plaintiff for refusing to pay the increased dues. The fraternal organization pleaded a prior multi-state class action judgment rendered by a Massachusetts state court on the same issues as a defense to the New York action. This Court held that the Massachusetts class action judgment was binding on the New York plaintiff. 237 U. S. at 544.

In the companion case of *Hartford Life Ins. Co.* v. *Ibs,* 237 U. S. 662 (1914), a beneficiary under a life insurance policy brought an action in the state court of Minnesota for benefits under the policy. The defendant refused to honor the claim because the deceased failed to pay increased assessments. The defendant pleaded a Connecticut state court class action judgment adjudicating the validity of the new assessments as a defense to the action. This Court held that the beneficiary was bound by the earlier Connecticut class action decree. 237 U. S. at 672.

In *Supreme Tribe of Ben-Hur* v. *Cauble,* 255 U. S. 356 (1921), a class action was brought in federal district court on behalf of persons who resided in many states of the Union. 255 U. S. at 360. The fraternal organization prevailed in the action, brought to adjudicate the right of the organization to issue new certificates. In a subsequent lawsuit brought by a class member in state court concerning the same issues, this Court held that the previous class action judgment was binding. While the class judgment was rendered by a federal rather than a state court, this Court held it was immaterial to its binding effect on non-resident class members, stating:

> "That a class suit of this nature might have been maintained in a state court, and would have been binding on all of the class, we can have no doubt. *Hartford Life Ins. Co. v. Ibs,* 237 U.S. 662, 672; *Royal Arcanum v. Green,* 237 U.S. 531."

255 U. S. at 366. (*See also: Hansberry* v. *Lee,* 311 U. S. 32, 41 (1940); *Sovereign Camp, W.W.* v. *Bolin,* 305 U. S. 66 (1938).)

In the case before this Court Petitioner has conceded that federal district courts have the power to bind members of a nationwide class who do not "opt out" of common question class actions (Cert. Pet. at 11), yet contends that due process requires more restrictive standards for the exercise of a state court's jurisdiction. Petitioner seemingly ignores the fact that considerations of due process are equally applicable to state and federal courts.

Petitioner similarly ignores that the class action rule, which is procedural, cannot expand federal court jurisdiction. *Snyder* v. *Harris,* 394 U. S. 332, 337-338 (1969). Except where expressly provided by federal statute, a federal court has no greater *in personam* jurisdiction than the courts of the state in which the federal court sits. (Fed. R. Civ. P. 4 (f); 4 Wright and Miller, Federal Practice and Procedure § 1124 (1969).) Thus, the power of a federal district court to bind non-residents of the state in which it sits in a class action must be based on the state court's concomitant power to render a similar judgment. That principle was recognized by this Court in *Supreme Tribe of Ben-Hur* v. *Cauble,* 255 U. S. at 366 and by the Supreme Court of California in *Atkinson* v. *Superior Court,* 49 Cal. 2d 338, 348, 316 P. 2d 960, 966 (1957), *cert. den. sub nom., Columbia Broadcasting System, Inc.* v. *Atkinson,* 357 U. S. 569 (1958). The court in *Atkinson* observed:

> "A remedy that a federal court may provide without violating due process of law does not become unfair or unjust because it is sought in a state court instead." 49 Cal. 2d at 348, 316 P. 2d at 966.

Due process considerations are present when rendering a class action judgment binding on non-resident plaintiffs. A state court may, consistent with due process, "adopt a procedure whereby some of the members of the class could stand in

judgment for all [where] the procedure were so devised and applied as to insure that those present are of the same class as those absent and that the litigation is so conducted as to insure the full and fair consideration of the common issue." *Hansberry* v. *Lee,* 311 U. S. at 43. Due process requires no minimum contacts of absent class members with the forum because class suits are representative suits. As such, the action must necessarily proceed in the absence of almost every class member, making the residential makeup of the class non-controlling. *Shutts* v. *Phillips Petroleum Co.,* 222 Kan. at 542, 567 P. 2d at 1305.

The difference between jurisdictional standards governing class actions and those governing other actions is well recognized. In *Hansberry* v. *Lee,* 311 U. S. at 40-42, this Court noted:

> "It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. *Pennoyer v. Neff,* 95 U.S. 714; 1 Freeman on Judgments (5th ed.), § 407. A judgment rendered in such circumstances is not entitled to the full faith and credit which the Constitution and statute of the United States, R. S. § 905, 28 U. S. C. § 687, prescribe . . .
>
> "To these general rules there is a recognized exception that, to an extent not precisely defined by judicial opinion, the judgment in a 'class' or 'representative' suit, to which some members of the class are parties, may bind members of the class or those represented who were not made parties to it. . .
>
> ". . . Courts are not infrequently called upon to proceed with causes in which the number of those interested in the litigation is so great as to make difficult or impossible the joinder of all *because some are not within the jurisdiction* or because their whereabouts is [sic] unknown or where if all were made parties to the suit its continued abatement by the death of some would prevent or unduly delay a decree. In such cases where the interests of those not joined are of the same class as the interests of those who are, and where

> it is considered that the latter fairly represent the former in the prosecution of the litigation of the issues in which all have a common interest, the court will proceed to a decree. . . ." (Emphasis added.)

The strict "minimum contacts" standard for non-resident plaintiffs proposed by Petitioner Gillette is not warranted. Unlike a defendant called to defend in a foreign jurisdiction or risk an adverse judgment, a non-resident plaintiff faces few ancillary risks if joined in a class action. The non-resident plaintiff is not exposed to coercive court orders, damages, court costs, or direct litigation expenses in the event of an adverse judgment. The *res judicata* effect of an adverse judgment on such absentees would be limited, simply preventing relitigation of issues actually decided in the prior class action.

In addition, Petitioner's argument ignores the protections required by state courts in the conduct of multi-state plaintiff class action lawsuits. Where non-resident plaintiffs are afforded notice, an opportunity to be heard, and adequate representation, there can be no doubt that due process considerations are satisfied. *Shutts* v. *Phillips Petroleum Co.*, 222 Kan. at 542, 567 P. 2d at 1305. In the course of ruling in Respondent's favor below, the Illinois Supreme Court noted that such protections must be afforded non-resident class members. *Miner* v. *Gillette Co.*, 87 Ill. 2d 7, 428 N. E. 2d 478 (1981); Cert. Pet. A5. Therefore, the due process considerations examined in the *Shutts* case are likewise satisfied here. For all of these reasons, the due process clause of the Fourteenth Amendment does not bar the state court rendition of a binding judgment on non-resident plaintiffs in a class action.

II. STATE COURTS DO NOT VIOLATE PRINCIPLES OF FEDERALISM BY REFUSING TO FORECLOSE A FORUM TO NON-RESIDENT PLAINTIFFS.

Notwithstanding Petitioner's charge that the Illinois Supreme Court has violated principles of federalism by its deci-

sion, the maintenance of national class actions in state courts promotes full justice under our federalist system. The central question is whether individual consumers will be permitted any forum at all for their grievances. In *Shutts* v. *Phillips Petroleum Co.*, 222 Kan. 527, 545, 567 P. 2d 1292, 1306 (1977), *cert. den.*, 434 U. S. 1068 (1978), the Kansas Supreme Court queried:

> "If state courts cannot maintain class action suits with non-resident plaintiffs, can the 'small man' find legal redress in our modern society which increasingly exposes people to group injuries for which they are individually unable to get adequate legal redress, either because they do not know enough or because such redress is disproportionately expensive?"

Acceptance of Petitioner's argument further erodes the legal redress available to the "small man."

Both Congress and this Court have manifested their intention that state courts hear multi-state class actions where individual claimants have less than $10,000 in damages. Congress has imposed the $10,000 jurisdictional amount (28 U. S. C. § 1332 (1964)); and this Court has strictly construed the jurisdictional statute. Named class representatives are not permitted to aggregate their claims to satisfy the jurisdictional amount. *Snyder* v. *Harris*, 394 U. S. 332 (1969). Each class member must satisfy the jurisdictional amount. *Zahn* v. *International Paper Co.*, 414 U. S. 291 (1973). Yet this Court has specifically stated that it did not intend to deny small claimants access to all forums, but that "Congress had determined that cases involving lesser amounts should be left to be dealt with by the state courts." *Snyder* v. *Harris*, 394 U. S. at 340. As a practical matter, the nationwide class action in state courts is the best vehicle for effecting relief to small claimants.

Although Petitioner seeks reversal of the decision below because it allegedly "authorizes encroachments on state judicial power" (Brf. for Pet. at 16), Petitioner is also transparently concerned about the elimination of the approximately 165,000

damage claims of potential class members. The objective is fragmentation of a nationwide class. Even Petitioner does not seriously contend that the non-resident class members will, in the event of reversal, hire attorneys to initiate state class actions in all affected states before the statute of limitations period has expired or that 165,000 individual suits will be filed in every state except Illinois. One of the primary functions of the class action is to prevent just this multiplicity of suit: the waste of "time, effort, and expense" caused by the maintenance of several actions to litigate the same issues. Advisory Committee's Note to Amended Rule 23, 39 F. R. D. 98, 102 (1966); *Daar* v. *Yellow Cab Co.*, 67 Cal. 2d 695, 714-15, 63 Cal. Rptr. 724, 738, 433 P. 2d 732, 745 (1967).

It is equally important to emphasize the consumer abuse allegedly committed in this case. Class suits provide deterrence to mass consumer wrongs, thereby preventing businesses from reaping profits by defrauding many consumers of a small amount. Kelven & Rosenfield, *The Contemporary Function of the Class Suit,* 8 U. Chi. L. Rev. 684, 686 (1941). Each year millions of consumers are defrauded, producing an aggregate loss of billions of dollars. Rothschild & Throne, *Criminal Consumer Fraud: A Victim-Oriented Analysis,* 74 Mich. L. Rev. 661, 672 (1976). The harm created by deceptive business practices exceeds even the monetary loss by consumers. Unchecked consumer fraud also shakes consumer confidence in the national marketplace and undermines uncompensated victims' faith in the judicial system. U. S. Department of Justice, National Institute of Justice, *Policy Brief: Consumer Fraud* (February 1982).

Even though effects of consumer fraud resound across state boundaries, Petitioner suggests that each state jealously guards its sovereign power to try consumer cases in its own courts. (Brf. for Pet. at 17.) The underlying assumption is that one state court is either incapable of applying the law of another state or unwilling to do so. Pure conjecture should not deprive

out-of-state plaintiffs of a forum. Although this cause has reached the highest Court in the land, it must be remembered that the case itself is at an early stage. There has been no class action certification.

The relevant Illinois statute provides that a class action may be "divided into sub-classes and each sub-class treated as a class." Ill. Rev. Stat. ch. 110, § 57.3(b) (1979). As the Illinois Supreme Court stated in its decision below:

> "The feasibility of subdividing a class is properly determined by the trial court at a preliminary hearing. (See generally *McCabe v. Burgess* (1979), 75 Ill.2d 457, 467, 27 Ill. Dec. 501, 389 N.E.2d 565.) We believe that the issue of whether the common question of fact or the individual questions of law predominate in the present case is dependent upon plaintiff's ability to establish that the differing laws of the States are subject to grouping in a manageable number of subclasses. If, after the parties have produced specific evidence relating to this question, the trial court finds that such subclasses of laws may be made, then the common question of fact will necessarily predominate and the statutory requirement will be satisfied."

Miner v. *Gillette Co.*, 87 Ill. 2d at 17-18, 428 N. E. 2d at 484. Petitioner has already concluded, however, that the trial court will group the differing laws of the states into sub-classes and then cause the laws to be improperly applied. That conclusion is erroneous. The only time Illinois courts will refuse to apply the law of another state is if the law is contrary to pure morals or abstract justice, or the law's enforcement would be of evil example and harmful to its own people. *Champagnie* v. *W.E. O'Neil Const. Co.*, 77 Ill. App. 3d 136, 139, 395 N. E. 2d 990, 992 (1979).

Class actions generally serve the important objective of judicial economy. In the context of consumer class actions, however, the main goal is necessarily different. That goal has been described as follows:

> "The consumer class action is not primarily a device to save court time through the consolidation of a number of lawsuits. Since most class members in consumer class action cases will have too small a stake to bring individual suits, the alternative is not many suits, but no suit.
>
> . . .
>
> A properly constructed class action procedure can be an efficient device to provide businessmen with incentive to avoid injuring a large number of consumers in the future."

National Institute for Consumer Justice, *Redress of Consumer Grievances: Report of the National Institute for Consumer Justice,* at 29 (1971). The objectives of affording individual consumer relief and of providing incentives for voluntary compliance with the law are important to every state. It is no usurpation of power when a state court actually takes steps toward affording that relief and providing those incentives to residents and non-residents alike.

Limiting a class to only state residents provides significantly less deterrence to a nationwide business engaged in deceptive business practices. The market place is a national one. The use of mass marketing, advertising and distribution techniques guarantees businesses that they can affect millions of consumers residing in many states. Insistence upon a class of only state residents necessarily allows an unscrupulous business to profit from its widespread consumer abuse. Multi-state class actions are needed to maximize both private and governmental enforcement of consumer protection laws.

CONCLUSION

For the reasons stated, the judgment of the Illinois Supreme Court should be affirmed.

Respectfully submitted,

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OTION FILED
JUN 7 1982

No. 81-1493

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

THE GILLETTE COMPANY,
Petitioner,

vs.

STEVEN MINER,
Respondent.

On Writ of Certiorari To The
Supreme Court of The State of Illinois

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICI CURIAE THE NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, THE ALLIANCE OF AMERICAN INSURERS AND THE AMERICAN INSURANCE ASSOCIATION IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM 1981

No. 81-1493

THE GILLETTE COMPANY,

Petitioner,

vs.

STEVEN MINER,

Respondent.

On Writ of Certiorari To The
Supreme Court of The State of Illinois

MOTION OF AMICI CURIAE THE NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, THE ALLIANCE OF AMERICAN INSURERS AND THE AMERICAN INSURANCE ASSOCIATION FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITIONER

The National Association of Independent Insurers, the Alliance of American Insurers and the American Insurance Association move pursuant to Supreme Court Rule 36.3 for leave to file the accompanying brief in support of petitioner The Gillette Company.

Because they transact business with millions of consumers across the country, *amici's* member insurance companies are especially likely to be sued in purported nationwide class actions. Pursuant to the McCarran-Ferguson Insurance Regulation Act of 1945, 15 U.S.C. §§ 1011-1015 (1976), the regulation of the business of insurance has been reserved primarily to the states, which have each enacted lengthy and complex statutes and administrative regulations governing the insurance business. The regulation of insurance by the separate

states, as envisioned by Congress when it enacted the McCarran-Ferguson Act, would be severely affected by the proliferation of nationwide class actions in state court forums lacking any contacts with absent non-resident class members.

Accordingly, *amici* believe that they will present arguments to this Court that will not be presented in the same form by the parties and that were not presented in *amici's* prior brief in support of the Petition for a Writ of Certiorari.

Amici have sought the consent of counsel for petitioners and counsel for respondent for leave to file the accompanying brief. Counsel for respondent denied this request.

For the foregoing reasons, *amici* the National Association of Independent Insurers, the Alliance of American Insurers and the American Insurance Association pray that this Court grant their motion for leave to file the accompanying brief in support of petitioner.

Respectfully submitted,

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Dated: June 4, 1982

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INTEREST OF AMICI CURIAE

Amici are trade associations composed of most of the major insurance companies writing policies of property and casualty insurance in the United States. Having already described their interest in this case in the brief which they submitted to this Court in support of the Petition for a Writ of Certiorari (pp. 1-2), *amici* simply reiterate here that the decision below may have a substantial impact on (1) class action litigation in which members of the associations become involved and on (2) the orderly regulation of the business of insurance in the United States.

SUMMARY OF ARGUMENT

Due process limitations on state court jurisdiction serve to implement fundamental "principles of interstate federalism embodied in the Constitution," *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 293 (1980), and to ensure the "orderly administration of the laws," *International Shoe Co.* v. *Washington*, 326 U.S. 310, 319 (1945). The decision below ignores these important policies underlying the constitutional limitations on *in personam* jurisdiction. When analyzed in connection with the experience of *amici's* members in class action litigation concerning the business of insurance, the policies of federalism and orderly administration mandate the conclusion that nationwide class actions may not be maintained in state court forums that do not have minimum contacts with non-resident class members.

ARGUMENT[1]

I. "PRINCIPLES OF INTERSTATE FEDERALISM EMBODIED IN THE CONSTITUTION" WOULD BE VIOLATED BY PERMITTING NATIONWIDE CLASS ACTIONS TO BE LITIGATED IN STATE COURT FORUMS LACKING MINIMUM CONTACTS WITH ABSENT NON-RESIDENT CLASS MEMBERS.

By limiting its jurisdictional analysis to a consideration of whether absent class members have been adequately represented and notified, Cert. Pet. A5, the Illinois Supreme Court ignored this Court's holdings that fairness and convenience of litigation in a state court forum cannot form the basis for *in personam* jurisdiction when litigants lack contacts with that forum. *E.g., Rush* v. *Savchuk*, 444 U.S. 320, 332-33 (1980); *International Shoe Co.* v. *Washington*, 326 U.S. 310, 319 (1945). In such cases, quite apart from the factors of notice and representation considered in the decision below,

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[1] *Amici* adopt, and will not repeat in this brief, the arguments presented in their brief filed in support of the Petition for a Writ of Certiorari.

"the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment." *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 294 (1980). The restrictions on state court jurisdiction are thus "'more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States.'" *Id.* (quoting *Hanson* v. *Denckla*, 357 U.S. 235, 251 (1958)).

The federalist principles implemented by the Due Process Clause reflect the balance struck by the Framers of the Constitution between competing policies of (1) fostering economic interdependence among the states, as mandated by the Commerce Clause, and (2) preserving the distinct sovereign identity of each state. *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 293 (1980). Pursuant to the Due Process Clause, the Framers "intended that the States retain many essential attributes of sovereignty, including in particular, the sovereign power to try causes in their courts." *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. at 293. Such sovereignty necessarily implies a corresponding limitation on the power of the courts of sister states, "a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment." *Id.* While that limitation has traditionally been invoked to restrict the power of state courts to exercise jurisdiction over a single non-resident defendant, it must apply with even greater force to prohibit the Illinois courts from exercising jurisdiction over approximately one hundred sixty-eight thousand absent class plaintiffs, J.A. 32, who concededly lack any contacts with Illinois. Cert. Pet. A3.

Especially offensive intrusions on the sovereignty of the individual states would result from assertions of jurisdiction over lawsuits brought against *amici's* member insurance companies on behalf of purported nationwide classes of policyholders or group insurance certificateholders. In addition to invading "the sovereign power to try causes" of the

courts of forty-nine sister states, *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 293 (1980), the forum court would necessarily disrupt the procedures established by each state's insurance code for administrative regulation of rates, policy forms, and marketing, underwriting and claims practices. *See, e.g.*, Ill. Rev. Stat. ch 73, §§ 755, 755.11—755.27 (as amended by P.A. 82-625), 766.5—766.8, 1028—1041, 1065.18-1—1065.18-34. Since those administrative orders are generally subject to direct judicial review, *e.g.*, Ill. Rev. Stat. ch. 73, § 1019, it is entirely possible that a judgment entered in a nationwide class action would conflict with judgments entered by sister state courts on direct review of decisions of those states' directors or commissioners of insurance.

In more concrete terms, nothing would be left of the "territorial limitations on the power of the respective States," *Hanson* v. *Denckla*, 357 U.S. 235, 251 (1958), if the Circuit Court of Cook County, Illinois became empowered to enter a judgment, binding on all Montana policyholders of an insurer, concerning the legality under Montana law of a standard automobile insurance policy provision which has already been reviewed and approved by a determination of Montana Commissioner of Insurance, Mont. Rev. Codes Ann. §§ 33-1-501, 33-1-502, subject to direct review by the courts of Montana, Mont. Rev. Codes Ann. §§ 33-1-701—33-1-711. "If the due process clause is not effective to restrain such extensions of local power, then the federal system is likely to be transformed into something very different from anything we have known." *Erlanger Mills, Inc.* v. *Cohoes Fibre Mills*, 239 F.2d 502, 509 (4th Cir. 1956).

II. THE EXERCISE OF STATE COURT JURISDICTION OVER NATIONWIDE CLASS ACTIONS PERMITTED BY THE DECISION OF THE SUPREME COURT OF ILLINOIS WOULD DISRUPT THE "ORDERLY ADMINISTRATION OF THE LAWS."

It is axiomatic that an important function of Due Process restrictions on state court jurisdiction is to ensure the "orderly administration of the laws." *World-Wide Volkswagen*

Corp. v. *Woodson*, 444 U.S. 286, 294 (1980); *International Shoe Co.* v. *Washington*, 326 U.S. 310, 319 (1945).

If words are to have their plain meanings, the "orderly administration of the laws" cannot be accomplished by permitting the courts of one state to adjudicate the rights of absent class members, who are residents of the other forty-nine states, under the laws and administrative regulations of each of those states. The decision below did not consider the constitutional dimension of this problem, but instead treated it as a question to be resolved under the requirement of Illinois' class action statute that questions common to the class predominate over those affecting only individual class members. Cert. Pet. A7-A9.

Overlooked by the Illinois Supreme Court's decision in this case is the chaotic interference with the administration of state law that would result from the litigation of nationwide class actions in state courts. If the decision below is affirmed, *amici's* members may well face lawsuits brought on behalf of nationwide classes of policyholders, alleging that marketing, underwriting, ratemaking or claims practices employed on a national basis are fraudulent, discriminatory, or otherwise unlawful. In order to make even a threshold determination of the identity of the members of such classes, in many cases the court would have to choose and apply the proper statute of limitations for each of the fifty states for each cause of action alleged in the complaint.[2] It would also be necessary to determine which states' insurance codes provided resident class members with remedies administered by the state departments of insurance. As to those class members, the doctrines of primary jurisdiction and exhaustion of administrative remedies would require stay or dismissal of the action. *Merrin Jewelry Co.* v. *St. Paul Fire & Marine*

[2] Such determinations are mandated by statutes requiring the application of the statute of limitations of the jurisdiction in which a cause of action arose, in cases in which that limitations period is shorter than the period prescribed by the statute of limitations of the forum. *See, e.g., Cal. Civ. Proc. Code § 361;* Ill. Rev. Stat. ch. 83, § 21.

Insurance Co., 301 F. Supp. 479, 482-83 (S.D.N.Y. 1969); *Wilkinson* v. *Norcal Mutual Insurance Co.*, 98 Cal. App. 3d 307, 159 Cal. Rptr. 416, 419-20 (5th Dist. 1979); *Nelson* v. *Blue Shield of Massachusetts, Inc.*, 377 Mass. 746, 387 N.E.2d 589, 593 (1979); *Gordon* v. *Hardware Mutual Casualty Co.*, 361 Mass. 582, 281 N.E.2d 573, 575-77 (1972).

Additionally, some or all of the state directors or commissioners of insurance might be indispensable parties, *Allen* v. *Aetna Casualty & Surety Co.*, 567 S.W.2d 547, 549-50 (Tex. Civ. App. 1978), *writ of error refused, no reversible error,* over whom the forum court may lack *in personam* jurisdiction. Only after resolving these complicated procedural matters, could a court hearing a nationwide class action begin to decide the issue of the defendant's liability under the fifty state common laws, statutory provisions, and insurance department regulations.[3]

Determination of the remedy, if the defendant were found to be liable under certain states' laws, would be an equally monstrous task. Severe problems would be created, for instance, if an Illinois court were to order an insurer to charge rates in Kentucky at variance with the rates filed with and approved by the Kentucky Department of Insurance. The Kentucky Insurance Commissioner could penalize the insurer for charging the new rate ordered by the court, Ky. Rev. Stat.§§ 304.13-190, 304.13-320(1), while the Illinois court could hold the insurer in contempt of court for disobeying its

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[3]The law on such issues varies widely among the states. For instance, in *Spirek* v. *State Farm Mutual Automobile Insurance Co.*, 65 Ill. App. 3d 440, 382 N.E.2d 111 (1st Dist. 1978), discussed by the court below, Cert. Pet. A2, the Illinois Appellate Court noted that "[t]he law of Illinois is clear that a medical subrogation clause in an insurance policy is valid and enforceable." 65 Ill. App. 3d at 449. Only months before the *Spirek* decision, the Supreme Court of Arizona held in a class action that, under Arizona law, any form of medical subrogation clause or repayment provision in an automobile insurance policy is unenforceable as against public policy. *Allstate Insurance Co.* v. *Druke*, 118 Ariz. 301, 576 P.2d 489, 492 (1978).

order if the insurer did not charge the new rate. Likewise, any attempt to recover class-wide punitive damages for purported bad faith by the insurer would require the court to review the conflicting laws of the states as to when such damages are available and when their recovery is precluded by the existence of a statutory remedy. *See generally*, Mandel, *Extracontract Damages Survey*, 16 Forum 874 (1981). Additionally, some of the deceptive trade practices statutes applicable to insurers authorize recovery of a penalty for violations of their provisions. *See, e.g.*, Mass. Gen. Laws Ann. ch. 93A, § 9 (1975 & Cum. Supp. 1982); Wash. Rev. Code Ann. § 19.86.090. The Illinois courts may not even be able to enforce other states' penalties in nationwide class actions, inasmuch as "[i]t is generally recognized that penalties fixed by state laws are not enforcible . . . in other State courts." *Schaefer* v. *H.B. Green Transportation Line, Inc.*, 232 F.2d 415, 418 (7th Cir. 1956). *Accord, Missouri River Telegraph Company* v. *First National Bank of Sioux City*, 74 Ill. 217, 218 (1874).

In its prior decisions on *in personam* jurisdiction, this Court has considered the preservation of "orderly administration of the laws" in terms of enabling a corporate defendant to plan its business activities so as to preclude the exercise of state court jurisdiction in states in which the corporation transacts no business. *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 297 (1980); *International Shoe Co.* v. *Washington*, 326 U.S. 310, 319 (1945). In the instant case, the threat to the "orderly administration of the laws" goes far beyond the interests of parties to particular cases in planning their activities. What is involved here is the prospect of Illinois courts attempting to construe and apply the laws and administrative regulations of all fifty states on issues as to which the laws of many states may well be unsettled and conflicting.[4] Thus, the decision below inevitably portends a substantial interference with the orderly

[4] Nationwide class actions would also present state judges with hundreds of conflict-of-law questions of the sort that once led Judge

development of separate bodies of state decisional law, which has traditionally come about through the reasoned and consistent elaboration of precedent by each state's courts. *See generally,* H. Hart and A. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 407-669 (1958).

CONCLUSION

For the reasons stated, the judgment of the Illinois Supreme Court should be reversed insofar as it applies to petitioner's motion to dismiss claims of non-resident class members, and the order of the Circuit Court of Cook County, Illinois, granting such motion, should be affirmed.

Respectfully submitted,

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Dated: June 4, 1982

Henry J. Friendly to comment: "Our principal task, in this diversity of citizenship case, is to determine what the New York courts would think the California courts would think on an issue about which neither has thought." *Nolan* v. *Transocean Lines,* 276 F.2d 280, 281 (2nd Cir. 1960), *remanded,* 365 U.S. 293 (1961).

*Counsel of Record

Amicus Brief

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MOTION FILED
JUN 7 1982

NO. 81-1493

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

THE GILLETTE COMPANY,

Petitioner,

v.

STEVEN MINER,

Respondent.

On Writ of Certiorari to the
Supreme Court of the State of Illinois

MOTION OF NEW ENGLAND LEGAL FOUNDATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE, AND BRIEF OF AMICUS CURIAE NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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MOTION OF NEW ENGLAND LEGAL FOUNDATION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE.

Pursuant to Rule 36.1 of the Rules of the Supreme Court, New England Legal Foundation moves the Court for leave to file its brief amicus curiae, bound with this Motion, in support of petitioner.

New England Legal Foundation (NELF) is a non-profit, public interest law foundation, organized and existing under the laws of the Commonwealth of Massachusetts, for the purpose of engaging in litigation on matters affecting the economic and constitutional interests of the people and businesses of New England. Policy for the Foundation is set by a Board of Directors, composed of citizens of each of the six New England states, a majority of whom are attorneys and members of the bar of their respective jurisdictions. The Board evaluates the merits of any contemplated legal action, and authorizes such action only when the Foundation's position has broad support within the community.

NELF has long been interested and involved in the constitutional and public policy issues surrounding the proper roles of the states vis-a-vis the federal government and each other. The Foundation has consistently supported

the proposition that in a federalist form of government no state may, without an overriding and constitutionally permissible purpose, interfere with the interests of its sister states. Whether by the imposition of economic barriers to the free interstate flow of commerce, or by the assertion of jurisdiction over matters rightfully the subject of adjudication by the courts of other states, no state may disrupt the orderly administration of the varying laws of the several states, nor deny to any other state the attributes of sovereignty reserved both by its heritage and as a condition of its consent to federal government.

NELF has previously filed briefs amicus curiae with this Court on issues related to the constitutional limitation on state powers which is at issue in the instant litigation. In New England Power Co. v. New Hampshire Public Utilities Commission, _____ U.S. _____, 50 U.S.L.W. 4223 (February 24, 1982), NELF filed a brief arguing that no state may, consistent with the dictates of the Commerce Clause of the Federal Constitution, prohibit the interstate sale of hydroelectric energy in order to reserve for its own citizens the economic benefits thereof. NELF contended that no

state possesses the right, absent a constitutionally compelling purpose, unilaterally to render its own interests paramount to those interests of its sister states which stand upon an equal constitutional footing. NELF has also been given the consent of the parties to file a brief amicus curiae in Kevin H. White v. Massachusetts Council of Construction Employers, No. 81-1003, in which the constitutionality of a municipal residents hiring quota is at issue. NELF will argue that the hiring quota represents the same sort of unilateral and protectionist response to a problem which implicates the interests of other sovereigns and their citizens as this Court struck down in New England Power Co. Similar issues of constitutional federalism are involved in the case presently at bar. And in City of Milwaukee v. Illinois, ____ U.S. _____, 68 L. Ed. 2d 114 (1981), NELF filed a brief treating the issue of federalism in the context of water pollution involving the interests of more than one state.

NELF's interest in the current litigation arises out of its belief that the ruling of the Illinois Supreme Court intrudes upon the interests of the other 49 states whose

citizens have allegedly been harmed by the defendant's activities, as well as the interests of those citizens themselves in securing a proper adjudication of their claims. In addition, NELF contends that the ruling does violence to the principles of in personam jurisdiction which have found voice through the Due Process Clause of the Fourteenth Amendment, and which have long served to ensure an orderly administration of the laws and provided for the peaceful adjudication of the conflicting interests of the several states within our federal form of government.

Amicus submits that the interests of non-forum states in the determination of the rights and responsibilities of their own citizens — the interests of non-resident plaintiffs in the control of their own causes of action — and the interests of the non-party citizens of any potential forum state which may be required to litigate such costly and impractical cases — are not adequately represented before this Court. NELF's public interest perspective, combined with its broad experience in the constitutional and economic aspects of cases involving the proper role of the states in our federalist system, will provide this Court with a point of

view not otherwise presented in the instant case. Amicus believes that it will present arguments, in opposition to the exercise of state court jurisdiction over the claims of non-resident plaintiffs with whom the state has no contacts, which will not be presented by the parties to this action or by other amici.

Amicus has sought the consent of counsel for Petitioner and of counsel for Respondent for leave to file the accompanying brief. Counsel for Respondent denied this request.

For the foregoing reasons, New England Legal Foundation prays that this Court grant its motion for leave to file the accompanying brief amicus curiae in support of the Petitioner.

By its Attorneys,

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INTEREST OF AMICUS CURIAE

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NELF has long been interested and involved in constitutional and public policy issues concerning the proper role of the states vis-a-vis the federal government and each other. The Foundation has consistently supported the proposition that in a federalist form of government no state may, without an overriding and constitutionally permissible purpose, interfere with the interests of its sister states. Whether by the imposition of economic barriers to the free

interstate flow of commerce, or by the assertion of jurisdiction over matters rightfully the subject of adjudication by the courts of other states, no state may disrupt the orderly administration of the varying laws of the several states, nor deny to any other state the attributes of sovereignty reserved both by its heritage and as a condition of its consent to a federal government.

NELF has previously filed briefs amicus curiae with this Court on issues related to the constitutional limitation on state powers which is at issue in the instant litigation. In New England Power Co. v. New Hampshire Public Utilities Commission, _____ U.S. _____, 50 U.S.L.W. 4223 (February 24, 1982), NELF argued that no state may, consistent with the dictates of the Commerce Clause of the Federal Constitution, prohibit the interstate sale of hydroelectric energy in order to reserve for its own citizens the economic benefits thereof. NELF contended that no state possesses the right, absent a constitutionally compelling purpose, unilaterally to render its own interests paramount to those interests of its sister states which stand upon an equal constitutional footing.

Recently, NELF has been granted consent of the parties to file a brief amicus curiae in Kevin H. White v. Massachusetts Council of Construction Employers, No. 81-1003, a case involving the constitutionality of a municipal hiring quota for city residents. NELF will argue that the hiring quota represents the same kind of unilateral and protectionist response to a problem which implicates the interests of other sovereigns and their citizens as this Court struck down in New England Power Co. Finally, in City of Milwaukee v. Illinois, ____ U.S. _____, 68 L. Ed. 2d 114 (1981), NELF filed a brief treating the issue of federalism in the context of the effects of water pollution control strategies on the interests of more than one state.

NELF's interest in the current litigation arises out of its belief that the ruling of the Illinois Supreme Court intrudes upon the interests of the other 49 states whose citizens have allegedly been harmed by the defendant's activities, as well as the interests of those citizens themselves in securing a proper adjudication of their claims. In addition, NELF contends that the ruling does violence to the principles of in personam jurisdiction which have found

voice through the Due Process Clause of the Fourteenth Amendment, and which have long served to ensure an orderly administration of the laws and provided for the peaceful adjudication of the conflicting interests of the several states within our federal form of government.

Amicus submits that the interests of non-forum states in the determination of the rights and responsibilities of their own citizens — the interests of non-resident plaintiffs in the control of their own causes of action — and the interests of the non-party citizens of any potential forum state which may be required to litigate such costly and impractical cases — are not adequately represented before this Court. NELF's public interest perspective, combined with its broad experience in the constitutional and economic aspects of cases involving the proper role of the states in our federalist system, will provide this Court with a point of view not otherwise presented. Amicus believes that it will offer arguments, in opposition to the exercise of state court jurisdiction over the claims of non-resident plaintiffs with whom the state has no contacts, which will not be presented by the parties to this action or by other amici.

SUMMARY OF ARGUMENT

This Court is presently asked to resolve the question of whether the courts of the State of Illinois may by application of the Illinois Class Action Statute extend jurisdiction to persons and causes of action not otherwise subject to the binding effects of judgments rendered by those courts.

Reduced to its simplest terms, the issue presented is whether the procedural dictates of class action suits enacted by the Illinois legislature for the protection and convenience of its citizens can create an independent basis for jurisdiction over non-residents who have no separate and distinct contacts with that state.

Through its actions Illinois would, in effect, render its courts a national forum for the resolution of cases which have no bearing upon the substantive policy decisions which the state has, by its laws, expressed, or which it has any authority to express.

Amicus contends that in so doing, Illinois violates the principles of state sovereignty which are implicit in the

structure of a federal system of government and encompassed within the protections of the Due Process Clause of the Fourteenth Amendment, and which have been consistently validated by this Court since its landmark decision of Pennoyer v. Neff, 95 U.S. 714 (1877). The decision of the Illinois Supreme Court would also deny to non-resident plaintiffs the fundamental fairness and substantial justice which the Due Process Clause is intended to ensure, and would undermine that "orderly administration of the laws" which this Court, in International Shoe v. Washington, 326 U.S. 310, 319 (1945), found central to the protections provided by the Due Process Clause.

ARGUMENT

I. THE DECISION OF THE ILLINOIS SUPREME COURT IMPERMISSIBLY INTRUDES UPON THE SOVEREIGN POWER OF SISTER STATES WHICH HAVE A SUPERIOR INTEREST IN DETERMINING THE RIGHTS OF THEIR CITIZENS AGAINST THE NAMED DEFENDANT.

A. Constitutional History and Decisional Law Reinforce the Role of Territoriality in Jurisdictional Analysis.

No sovereignty can extend its process beyond its own territorial limits, to subject either persons or property to

> its judicial decisions. Every exertion of authority beyond these limits is a mere nullity, and incapable of binding such persons or property in other tribunals. Justice Story, Commentaries on the Conflict of Laws, §539 (6th ed. 1865)

Although Due Process Clause limitations on the exercise of jurisdiction by state courts have been relaxed over the years, Justice Story's assertion of territorial restraints on individual state power remains valid. For over 100 years, this Court has denied the proposition that state borders are irrelevant for jurisdictional purposes. Pennoyer; International Shoe; Shaffer v. Heitner, 433 U.S. 186 (1977); World-Wide Volkswagen Corporation v. Woodson, 444 U.S. 286 (1980).[1] This posture reflects adherence to the principle of interstate federalism embodied in the Federal Constitution by its Framers. Despite the surrender of some sovereign powers by individual states in order to constitute the federal union, each was also to retain many of the essential attributes of sovereignty, including the right to

[1]This Court has also demonstrated allegiance to the continued integrity of state sovereignty distinctions in other constitutional contexts. National League of Cities v. Usery, 426 U.S. 833 (1976).

resolve disputes involving their citizens or property lying within their boundaries. Van Brocklin v. Tennessee, 117 U.S. 151, 167 (1886).

This sovereignty, or limited exclusivity, implied a corresponding limitation on the authority of sister states, or conversely a limitation on each state from intruding into the primary activity of the citizens of every other state. Effectively, each State is to possess "equal constitutional right and power." Escanaba Co. v. Chicago, 107 U.S. 678, 689 (1883). This limitation on individual state power has been found to be express or implicit in both the original structure of the Constitution and the Fourteenth Amendment. World-Wide Volkswagen, 444 U.S. at 293; Note: Multistate Plaintiff Class Actions: Jurisdiction and Certification, 92 Harv. L. Rev. 718, 729 (1979). It extends back not only to the debates at the Constitutional Convention, but also to antecedents in natural justice, and has been uniformly acknowledged by this Court.

Perhaps the earliest clear exposition of federalist limitations on the exercise of state court jurisdiction was the opinion of Mr. Justice Field in Pennoyer v. Neff, 95 U.S.

at 720, 722, where it was recognized as

> a principle of general, if not universal, law [that t]he authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. [citing D'Arcy v. Ketchum, 11 How. 165 (1850)] ....One of these principles [of public law] is, that every State possesses exclusive jurisdiction and sovereighty over persons and property within its territory. As a consequence, every State has the power to determine for itself the civil status and capacities of its inhabitants; to prescribe...the forms and solemnities with which their contracts shall be executed, the rights and obligations arising from them, and the mode in which their validity shall be determined and their obligations enforced....The other principle of public law referred to follows from the one mentioned: that is, that no State can exercise direct jurisdiction and authority over persons or property without its territory.

Pennoyer found these principles of "public law" to have been subsumed within the meaning of the Due Process Clause of the Fourteenth Amendment to the Federal Constitution. Id. at 733. And it was the Due Process Clause, and its federalist notion of territoriality, which the Court later utilized to delineate jurisdictional limitations

even while setting forth a more flexible standard than the "presence" requirement announced in Pennoyer. In order to accommodate a State's authority to determine the rights of its citizens as against a nonresident corporate defendant, the Court, in International Shoe Co. v. Washington, 326 U.S. 310 (1945), modified the "presence" rule of Pennoyer by declaring that where the rights of its citizens arising out of the "minimum contacts" of a nonresident defendant corporation were at stake, a state was permitted to exercise jurisdiction. The due process condition on the exercise of that jurisdiction, however, was that the "minimum contacts" be of such a nature as to make it reasonable, "in the context of our federal system of government," to require the defendant to appear and defend the litigation in that forum. International Shoe, 326 U.S. at 317.

It is inherent in the very nature of our federal system of government, and the oft-competing interests and differing substantive laws of its co-equal sovereign states, that the Federal Constitution ensure "the fair and orderly administration of the laws." Id., at 319. In fulfilling that need, the Due Process Clause of the Fourteenth Amendment

requires that the quality and nature of a defendant's activity be such that the forum state have a proper interest in adjudicating its conduct, in the absence of which the defendant's home state may be heard to complain of the usurpation of its own judicial authority.[2]

The importance of the role of territoriality in due process jurisdictional analysis was also treated by this Court in Hanson v. Denckla, 357 U.S. 235 (1958), where an attempt by Florida courts to assert jurisdiction over a Delaware trust and trustee was rejected. While noting the trend to the more flexible standard of International Shoe, the Court cautioned against the disregard of all restrictions on the personal jurisdiction of state courts. Such restrictions

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[2]The adequacy of service of process as notification to the defendant was treated as a separate due process issue in International Shoe, 326 U.S. at 320. Likewise, the adequacy of the class action procedure as a means of notifying absent class members and allowing them an opportunity to appear and prosecute their claims is an issue of due process separate and distinct from that of jurisdiction over the parties to the litigation. The Supreme Court of Illinois in the case at bar has incorrectly found that provision of adequate notice and opportunity to appear fully satisfies the dictates of the Due Process Clause. Miner v. Gillette Co., 87 Ill. 2d 7, 15; 428 N.E. 2d 478, 482-83 (1981). Without jurisdiction over the parties, however, there can be no authority to command them, upon adequate notice, to appear and litigate their claims.

operate not only to protect a defendant against the inconvenience of litigating in a distant forum, but as "a consequence of territorial limitations on the power of the respective states." Hanson, 357 U.S. at 251. The Court distinguished McGee v. International Life Insurance Co., 355 U.S. 220 (1957), where the cause of action arose out of the defendant's contacts with the forum state, giving rise to an interest on the part of the forum state in providing effective redress for its citizens. In Hanson, by contrast, the plaintiff's cause of action was not brought to enforce any obligation which arose from the privilege of the defendant's doing business in Florida. Hanson, 357 U.S. at 252. The Court succinctly stated the principle by which a forum state's interest in litigation arises, thereby reaffirming the due process principles of Pennoyer.

> The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State....[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the

> benefits and protections of its laws.
> Id. at 253.

See also, Kulko v. Superior Court, 436 U.S. 84, 93-94 (1978). By the same principle, in the absence of a plaintiff whose purposeful act avails himself of the benefits and protections of the forum state's laws, the forum state itself has neither an interest in the determination of his rights, nor the authority to adjudicate them. To do so would be to assume the authority of the plaintiff's home state, and to contravene the territorial imperatives of the Due Process Clause.

That the Due Process Clause serves to delimit the authority of the states, as well as to ensure procedural protections to those over whom that authority is exercised, has recently been explicated in World-Wide Volkswagen. While recognizing the requirement of adequate notice to a defendant, the Court therein emphasized that due process also requires the existence of personal jurisdiction, as determined by the minimum contacts test of International Shoe. The majority, speaking through Mr. Justice White, enunciated the two separate but related functions which the

minimum contacts doctrine serves: "It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the states, through their courts, do not reach out beyond the limits imposed on them by their status as co-equal sovereigns in a federal system." World-Wide, 444 U.S. at 291-292.

Jurisdictional considerations may no longer be governed exclusively by notions of territoriality, but the principle of limitations on the exercise of sovereignty, imposed by participation in the federal scheme, retains its vitality. The exercise of jurisdiction must be determined in light of its "reasonableness", assessed "in the context of our federal system of government," and applied to ensure "the orderly administration of the laws." Id. at 293-294.

> Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to

render a valid judgment. World-Wide Volkswagen, 444 U.S. at 294.

B. The Decision of the Illinois Supreme Court Contravenes the Rationale of International Shoe, and Violates the Principles of State Sovereignty as Embodied in the Due Process Clause.

The long line of precedent traced above is dismissed rather summarily by the Illinois Supreme Court in its opinion. The court would instead substitute a theory, unsupported by the opinions of this Court, that in state class actions the "minimum contacts" requirements of International Shoe and its progeny are inapplicable, and that the procedural due process safeguards of notice and adequate representation are sufficient for jurisdiction over non-resident plaintiffs. Relying upon Shutts v. Phillips Petroleum Co., 222 Kan. 527, 567 P. 2d 1292 (1977), in which it was held that in a class action non-resident plaintiffs may be bound even in the absence of minimum contacts so long as they receive notice and adequate representation, the Illinois Supreme Court reasoned that since the representative plaintiff and the defendant are within the jurisdiction of the court, a sufficient nexus is

established so that, for purposes of convenience and judicial efficiency, it may resolve issues as between all non-resident plaintiffs of the class and the defendant.

This rationale totally ignores the dictates of interstate federalism in jurisdictional doctrine. Moreover, the reasoning of the courts in both Shutts and Gillette fails to address the dual purposes of the "minimum contacts" test, namely, fairness to the parties and the integrity of the federal structure of residually sovereign states. See, Note, Multistate Class Actions, 92 Harv. L. Rev. at 729. Any notion that the Court in International Shoe, by relaxing the "presence" requirement of Pennoyer, had intended to combine the doctrine of personal jurisdiction with that of forum non conveniens was forcefully rejected in Hanson. The Court stated that constitutional restraints on state court jurisdiction continue to be a "consequence of territorial limitations on the power of the respective states." Hanson, 357 U.S. at 251. International Shoe simply sought to develop a more rational and workable standard than that of "presence."

Affirmance of the Illinois Supreme Court decision would result in the dangers warned against in World-Wide Volkswagen — a state court asserting jurisdiction over the claims of non-resident plaintiffs on causes of action arising out of events which have no connection with the minimum contacts admitted to exist between the resident plaintiff and the defendant, and the consequent usurpation of the authority of sister states which may have a superior interest in adjudicating the rights of their citizens by their rules and by imposition of their own remedies.

The theory that the "common question" class action, admittedly a mere procedural device to facilitate the joinder of similar but unaffiliated claims, could be elevated to the level of jurisdictional justification where no other contacts exist violates all previous principles of due process. It would result in the anomoly that adoption of a procedural rule by a state legislature, in which non-residents are given no right of participation, and absent other independent bases for exercising jurisdiction, would suffice to bind non-resident plaintiffs to the policy decisions of a forum state's governing body and the judicial control of its courts.

Each state in which the defendant's promotional campaign was undertaken has an interest in determining the rights and liabilities arising from that conduct as between its citizens and the defendant.[3] To the extent that Illinois, absent any affiliating circumstances with the potential causes of action existing between the defendant and residents of sister states, invokes an authority to render binding judgments on liability arising from those causes of action, it has encroached upon the territorial integrity —the sovereignty — of every other state.

Sovereignty includes the inherent right to adjudge liabilities according to established social and economic policies as enacted by a state's political representatives, pursuant to procedural rules administered by a state's own administrative or judicial tribunals, and subject to penalties

[3]The forum state would also presumably have a legitimate interest in adjudicating the rights of non-resident plaintiffs who responded to the promotional scheme while within the forum state. The instant case, however, relies upon no such allegations, and it is presumed arguendo that each member of the plaintiff class received and responded to the promotion only in his state of residence, and not in Illinois.

and forfeitures established by representative governing bodies. In creating this environment, each state presumably weighs the economic and social benefits of encouraging corporate or individual activity against the costs or disadvantages to its citizens. If the Illinois Supreme Court decision is permitted to stand, each state would, in a significant area of sovereign activity, be permitted to render those value judgments on behalf of sister states.

Illinois, which has no contacts with the non-resident plaintiffs, suggests that it may create that contact through the notice provision of its statute from which, it claims, jurisdiction somehow emanates. This circular logic is inconsistent with the reasoning of International Shoe and World-Wide Volkswagen, and ignores the limitations rightly signaled by another Illinois court:

> There is also no dispute that out-of-state residents could appear and subject themselves to the jurisdiction of Illinois courts. However, we find it beyond this court's authority, consistent with due process, to force them to do so. Spirek v. State Farm Mutual Auto Ins. Co., 65 Ill. App. 3d 440, 452, 382, N.E. 2d 111, 120 (1978).

It is to this compulsion as embodied in the Illinois Class Action Statute, and its interpretation by the Illinois Supreme Court to which we now turn.

II. FUNDAMENTAL FAIRNESS AND SUBSTANTIAL JUSTICE MANDATE THAT JURISDICTION OVER NON-RESIDENT PLAINTIFFS IN THIS CASE CONFORM TO THE "MINIMUM CONTACTS" DICTATES OF INTERNATIONAL SHOE v. WASHINGTON.

From the analysis of the origins of "minimum contacts" requirements outlined above, and from a reading of the Illinois Class Action Statute, Ill. Rev. Stat. ch. 110, §57.2, as interpreted by the Illinois Supreme Court, amicus contends that jurisdiction over non-resident plaintiffs in this case must be treated by the same standard as that used for defendants. Feldman v. Bates Mfg. Co., 143 N.J. Super. 84, 362 A. 2d 1177 (1976); Klemow v. Time, Inc., 466 Pa. 189, 352 A. 2d 12 (1976). See also, Uniform Class Action Act, U.L.A. vol. 12. Amicus reaches this conclusion because the same principles of fundamental fairness and substantial justice which require "minimum contacts" in order to justify a court's assertion of authority over a non-resident defendant are implicated in the assertion of authority over a

non-resident plaintiff.

The issue of state court jurisdiction over plaintiffs has rarely been litigated. This is so because customarily plaintiffs voluntarily submit themselves to the jurisdiction of courts in order to pursue their claims. However, an analogous issue has been presented to this Court on a few occasions in the context of unwilling claimants in the posture of nominal plaintiffs having their rightful claims adjudicated by foreign courts. In each of these cases, this Court has required the existence of personal jurisdiction. New York Life Ins. Co. v. Dunlevy, 241 U.S. 518 (1916) (interpleader); Hanson (declaratory relief); Vanderbilt v. Vanderbilt, 354 U.S. 416, 418-419 (1957) (support rights of absentee divorcees).'

Any attempt by the proponents of the Illinois Supreme Court rule to argue that the availability of the opt-out procedure of the Illinois Class Action Statute provides a manifestation of consent sufficient to confer jurisdiction over non-resident plaintiffs is unpersuasive. In no way does that device, which imposes an affirmative duty to act or be bound, diminish the "indispensability of purposeful contacts"

required between the party over whom jurisdiction is to be exercised and the forum state. Shaffer; Kulko; World-Wide Volkswagen; Rush v. Savchuk, 444 U.S. 320 (1980). It cannot be equated with the voluntary act of submitting one's person to a court's jurisdiction, thereby purposefully availing oneself of the convenience of a foreign state's courts. Moreover, the opt-out provision places the cart before the horse, in that it first presumes jurisdiction over non-resident plaintiffs who have had no independent connection with the forum state, and then imposes upon them the obligation to act or be bound by the judgments of that forum. Thus, if an absentee plaintiff fails to respond to the notice of suit by exercising the option to be excluded from the judgment because of confusion, delay, misunderstanding or inadvertence, he is bound thereby and his rights are determined, and both his state and every other with an interest in the rights at issue (assuming application of "full faith and credit" doctrine) is foreclosed from determining the rights of its own citizens.

Such an argument represents bootstrapping in the extreme, and fails to satisfy the requirements of due process as announced by this Court, either in terms of fundamental fairness or state sovereignty.

Similarly, drawing from the rationale of the decisions of this court which have confirmed the role of the "due process clause...as an instrument of interstate federalism," World-Wide Volkswagen, 444 U.S. at 293-294, it is highly unlikely that a state court, which lacks the authority to bind non-resident plaintiffs because of the absence of any affiliating circumstances, could impose a duty on them to act in order to avoid being controlled by its judgment. Note, Multistate Plaintiff Class Actions, 92 Harv. L. Rev. at 734.

The lack of a "foothold of jurisdiction" over non-resident plaintiffs in this case is a fatal defect, and contravenes the precepts of interstate federalism, fair play and substantial justice. Feldman at 1181.

III. THE DECISION OF THE ILLINOIS SUPREME COURT WILL UNDERMINE THE ORDERLY ADMINISTRATION OF THE LAWS.

The due process limitations upon the more liberal rule of in personam jurisdiction over corporate defendants as set forth by Mr. Justice Stone in International Shoe were considered necessary not only to protect the quasi-sovereign rights of other states having a jurisdictional interest in a dispute, but also to ensure "the orderly administration of the laws." 326 U.S. at 319. That theme has served as a common link throughout the chain of decisions which this Court has issued on questions of personal jurisdiction. It dovetails conceptually into the federalist and fairness due process arguments presented in sections I and II, supra, but also invokes considerations of practicality and consistency of result which are implicated by the case at bar.

The matter before this Court presents the extreme and impractical consequences of a ruling that a nation-wide class action may be entertained and resolved by a state court in the absence of personal jurisdiction over a substantial number of the claimants. The Illinois court would propose to divide the plaintiff class into fifty sub-

classes, each composed of claimants from a single state. To each sub-class the court would then seek to apply the substantive laws of the jurisdictions wherein the plaintiffs reside. Such a procedure promises to be a costly and time-consuming burden upon all parties, as well as the court itself, and will inevitably result in determinations which in critical respects differ from those which would be expected in the courts of each foreign jurisdiction.

Merely deciding, as a matter of choice-of-law, to apply the substantive laws of the foreign jurisdictions in which absentee plaintiffs or defendants reside does not alone satisfy the requirements of due process.

> Even when a court would apply the law of a different forum, [footnote omitted] as a general rule it will feel less knowledgeable and comfortable in interpretation, and less interested in fostering the policies of that foreign jurisdiction, than would the courts established by the State that provides the applicable law. Shaffer v. Heitner, 433 U.S. at 225 (Brennan, J., concurring in part and dissenting in part).

The Illinois court, by assuming the burden of serving as the forum for the interpretation of the varying laws of all fifty

states, inevitably promises a result different from that which non-resident plaintiffs have a right to expect in their home states, which the defendant has a right to expect in the adjudication of its conduct as to the non-resident claimants, and which every foreign jurisdiction has a right to impose in effectuating the social and economic policy decisions underlying its own substantive laws.

Moreover, the Illinois choice-of-law rules call for the application of a substantial body of Illinois law to the non-resident claims in this case. Under Illinois conflicts rules, all procedural questions are governed by Illinois law, including burdens of proof and production, presumptions, and sufficiency of evidence. See, Restatement of Conflict of Laws, §585 (1934); Restatement (Second) of Conflict of Laws, §122 (1971). There is, as well, authority for the proposition that Illinois may apply its own remedy to all members of the nation-wide class. Frankel v. Allied Mills,

Inc., 369 Ill. 578, 17 N.E. 2d 570, 571-72 (1938).[4] Neither in the Due Process Clause nor elsewhere in the Constitution is there to be found justification for the authority of one state to apply its own manner of redress of a harm which touches only the interests of another state, a co-equal member of the federal union.

The destructive consequences of the Illinois court's decision upon the orderly administration of the laws and an efficient resolution of claims are further apparent from a national perspective. If in the instant case Illinois is found to be an appropriate forum, then any one of the other forty-nine states could as easily have provided the forum for this action, or a similar one in the future against any corporation, such as the defendant, actively engaged in business throughout the nation. If two identical actions are

[4]At least several other jurisdictions, all of which just as easily could have been chosen as the forum for this litigation, under the rule of the Illinois Court, would also apply to the entire class the remedy of the forum. See Danow v. Beneficial Finance Co., 370 So. 2d 1001 (Ala. Civ. App. 1979); Goodman v. Olsen, 305 So. 2d 666 (Fla. 1974); Jones v. Andrews, 82 S.E. 2d 503 (Ga. 1954); United States Leasing Corp. v. Keiler, 290 So. 2d 427 (La. App. 1974); Jones v. Prudential Ins. Co., 42 S.E. 2d 331 (S. Car. 1945).

commenced simultaneously in two separate jurisdictions, the resolution of the claims and the legal liabilities of the parties may come to depend solely on which jurisdiction has the more efficient judicial system, the greater number of judges, or the shorter docket. The race may even be between as many as five, ten, or fifty competing jurisdictions, in each of which plaintiffs' attorneys may have a fee contingent upon being the first to recover and bind the rights of the class. The defendant may be forced to defend the same claims in several states at the same time. And since choice-of-law rules vary widely among the fifty states,[5] uniformity of result among the various jurisdictions

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[5]A number of jurisdictions retain the same traditional choice-of-law rules as Illinois and would apparently also apply the substantive law of each of the fifty states: Alabama, Arkansas, Connecticut, Delaware, Florida, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Mexico, North Carolina, North Dakota, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia.

However, many jurisdictions have adopted more modern choice-of-law rules which, depending upon the circumstances of the individual case, may well lead to a different choice of substantive law: Arizona, California, Colorado, District of Columbia, Georgia, Hawaii, Idaho, Indiana, Iowa, Kentucky, Mississippi, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Puerto Rico, Vermont, Washington, Wisconsin, Wyoming. 16 Am. Jur. 2d, Conflict of Laws, §80-83 (1979).

is improbable. The rights and liabilities of the parties to a multi-state class action may, as a result, be determined by the forum achieving the speediest resolution of the controversy, rather than by that which has the greatest interest in determining the rights of the parties.

The inevitable result of such a rule would be an encouragement to forum-shopping of the most grievous degree. Plaintiffs may seek the jurisdiction with the most beneficial substantive law application or remedy, the most favorably disposed bench, or the least back-logged courts. Those jurisdictions which satisfy the needs of plaintiffs and their counsel may become class action capitals of the nation.

The principles of due process require a more orderly and predictable approach to the administration of the laws, and the Illinois Class Action statute, Ill. Rev. Stat. c. 110, §57.2, itself is drawn to ensure these due process requirements. As a matter of statutory construction within constitutional limitations, that Act precludes this case from proceeding as a multi-state class action. While the basic fact pattern of the transaction between the defendant and each claimant may be similar and easily proved, the

predominating reality of the trial of such a case will be the divergent application of the laws of the fifty states in which the claimants reside. Such a crazy-quilt of choices of law defeats the commonality requirement of the class action statute as surely as it does the due process rights of the parties.

Nor is the efficiency of judicial administration purportedly served by application of the class action procedure enjoyed by those who must pay the costs of the complex trial procedure required. Whereas the costs of such a lengthy and complicated trial will be borne ultimately by the citizens and taxpayers of Illinois, any economic benefits derived from the elimination of trials in foreign courts will inure to the benefit of the citizens of those foreign states and not to the citizens of the forum state. To the extent that the Illinois court seeks to employ its judicial process to adjudicate claims which in no manner touch the interests of that state or its citizens, it offers no efficiency of judicial administration to the sovereignty which provides its sole grant of authority.

CONCLUSION

For the reasons stated hereinabove, amicus submits that the decision of the Illinois Supreme Court should be reversed, and that the class action brought as to all non-resident claimants should be dismissed for want of in personam jurisdiction.

Respectfully submitted,

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MOTION FILED
AUG 4 1982

No. 81-1493

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE GILLETTE COMPANY,

Petitioner,

v.

STEVEN MINER,

Respondent.

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF PUBLIC CITIZEN SUPPORTING RESPONDENT

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August 4, 1982

THE CASILLAS PRESS, INC. – 1717 K Street N.W. – Washington, D.C. – 223-1220

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THE GILLETTE COMPANY,

Petitioner,

v.

STEVEN MINER,

Respondent.

MOTION OF PUBLIC CITIZEN FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rule 36.3 of the Rules of this Court, Public Citizen hereby moves for leave to file the accompanying brief *amicus curiae* in support of the respondent Steven Miner. Consent has been sought, but petitioner has declined to grant it.

This case raises the question of whether the due process clause of the Fourteenth Amendment precludes a state from including in a plaintiff class persons who are nonresidents of the State and who have no connection with it except as class members. The outcome is likely to have a significant effect on the ability of individual states to handle burgeoning litigation through class actions.

Public Citizen is a nonprofit public interest organization, supported by contributions from more than 40,000 individuals each year. It will be affected by the outcome of this case both because its staff attorneys represent named plaintiffs in class actions and because they represent unnamed members of plaintiff classes whose rights are affected by the class representatives. It is this latter perspective that places Public Citizen in a slightly different posture than respondent in this case.

Public Citizen believes that its brief will assist the Court because its analysis of the due process issue differs markedly from that advanced by the parties, the other *amici,* and the Illinois courts. Public Citizen contends that the appropriate method to decide whether due process has been met is by analyzing the question under the principles ennunciated in *Mathews v. Eldridge,* 424 U.S. 319 (1976), a case not previously cited by anyone else.* In our view, the determination of "what process is due" to non-Illinois class members is best decided by applying the three criteria set forth in *Mathews,* not by discussing the applicability of cases such as *International Shoe Co. v. Washington,* 326 U.S. 310 (1940), in which defendants were sued in States other than their residence. Because this case involves the very different interests of unnamed, non-resident members of a plaintiff class, the due process cases establishing where a defendant may be sued are simply not relevant. Since this fundamentally different perspective would be offered by no other person, including, we believe, any other *amicus,* this brief will provide a useful addition to the Court's consideration of this matter.

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*We are advised that respondent's brief will incorporate by reference the argument made by *amicus* regarding the applicability of *Mathews v. Eldridge.*

For the foregoing reasons, the Court should grant Public Citizen leave to file the accompanying brief *amicus curiae*.

Respectfully submitted,

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August 4, 1982

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Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR *AMICUS CURIAE* PUBLIC CITIZEN SUPPORTING RESPONDENT

INTEREST OF *AMICUS CURIAE*

The interest of the *amicus curiae* Public Citizen is set forth in the accompanying motion for leave to file this brief.

STATEMENT OF THE CASE

Respondent Steven Miner filed this class action against petitioner The Gillette Company in the Circuit Court of Cook County, Illinois, alleging both a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act (Ch. 121 1/2, Paras. 261 *et seq.*, Ill. Rev. Stat.) and a

claim for breach of contract. The claims are based on a nationwide promotional campaign initiated by petitioner in which it offered an Accent table lighter (which was valued by it at $7.95) in exchange for submitting proof of purchase of two Cricket disposable lighters, plus 50 cents. Petitioner had estimated that it would need 250,000 Accent lighters, but it turned out that an additional 180,000 individuals accepted petitioner's offer. This lawsuit resulted when petitioner failed to honor its commitment to the additional 180,000 individuals, but instead returned their 50 cents and sent a Cricket lighter in place of the promised Accent.

Over the objection of petitioner, the Illinois Supreme Court ruled that respondent's class action complaint could proceed both with respect to the approximately 11,000 class members who were Illinois residents, and the remaining 169,000 who reside elsewhere. Petitioner asks this Court to overturn that ruling on the ground that the due process rights of the non-resident members of the class would be violated by including them as class members.

SUMMARY OF ARGUMENT

This Court should dismiss the writ of certiorari for want of jurisdiction for two related reasons. First, the deprivation of due process relied on by petitioner is not ripe for adjudication. Only if the non-Illinois class members were deprived of their claims against petitioner would it be necessary to reach the question of whether such deprivation is consistent with due process. Until that occurs, if it does, the issue presented by petitioner is premature.

Second, the party alleging a due process violation — the petitioner — is not a non-resident member of the plaintiff class, but the person who the class alleges violated their

rights and thereby caused this lawsuit. This Court has held that, in general, one person lacks standing to rely on the rights of another, with certain fairly limited exceptions. *Singleton v. Wulff,* 428 U.S. 106, 113-116 (1976). Whatever the extent of those exceptions may be, no case has ever permitted a person with a directly adverse interest to the one whose rights are at stake to assert those rights. Accordingly, petitioner's due process claims, which are based on the rights of members of the class represented by respondent, should be dismissed because petitioner lacks standing to assert them.

In any event there has been no due process violation. The question of what process is due to non-resident class members should be determined by balancing the three factors set forth by this Court in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976): the private interest of the class members, the need for additional procedural protections, and the governmental interests, including the administrative and financial burdens of affording greater protection.

The balance in this situation clearly establishes that the standards of due process have been met. At stake is simply a claim for $7.95; no absent class member will have to pay anything if the case is lost. Second, because of the common interests of all class members, and because the Illinois court must find that the class representation is adequate, there is no need for additional procedural safeguards for non-Illinois class members. Third, Illinois has agreed to accept the burden of handling a nationwide class, and no other class member has expressed an interest in litigating the matter elsewhere. Therefore, since all three factors support the inclusion of both Illinois and non-Illinois class members, due process has been satisfied.

ARGUMENT

Introduction

At the outset it may be worth stating the obvious: no prior cases determine the outcome of this action. Some of the cases cited by the parties are useful by analogy; others, which reach the same result as did the court below, arose in contexts which are arguably distinguishable; and most of those cited by petitioner are not controlling or even relevant because they deal with the rather different question of whether a *defendant* can be sued outside of his State of residence and made to go to the expense and inconvenience of litigating in a distant forum. This is, therefore, the first occasion for the Court to address the question of whether a state court may properly include as a member of a plaintiff class persons who reside outside the forum State and whose only connection with it is as member of the class suing there.

To make the necessary analysis, it is useful to begin with the constitutional provision at issue here, the second clause of the first section of the Fourteenth Amendment. It provides "nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ." While the concept of due process is a sweeping one, there are a number of terms in this clause which deserve the Court's specific attention because they demonstrate what precisely is at issue in this particular case. Moreover, a close examination of the alleged violation here demonstrates that there is not yet any deprivation protected by the Fourteenth Amendment, nor will any occur in the future.

I. THE COURT SHOULD NOT DECIDE THE DUE PROCESS CLAIM ARGUED BY PETITIONER.

The Fourteenth Amendment prohibits only deprivations by the "State." In this case the State is acting through the Illinois court system. Yet it is clear that to date no one has been deprived of anything. The most that petitioner can allege is that if the class is certified, *and* if the respondent does not prevail, then out-of-state class members will have been deprived of their claims against Gillette without due process of law. However, that claim of future harm may never occur and therefore ought not to be addressed by the Court until it does. *Golden v. Zwickler,* 394 U.S. 103 (1969). *Compare, Regional Rail Reorganization Act Cases,* 419 U.S. 102, 143 (1974) (delay irrelevant when injury is inevitable). In short, this claim is simply not ripe for adjudication, and if there is any rule firmly grounded in our jurisprudence, it is that courts should not decide major constitutional issues such as this until required to do so. *Ashwander v. Tennessee Valley Authority,* 297 U.S. 288, 341, 346-48 (1936) (Brandeis, J., concurring).

Not only is the claim premature, but it also lacks a concrete setting in which to decide it. Again, this Court has often emphasized the necessity of a firm factual basis before ruling on important questions, *United Public Workers of America v. Mitchell,* 330 U.S. 75, 90 (1947), and *Public Affairs Associates, Inc. v. Rickover,* 369 U.S. 111 (1962), and there is no reason for deviating from that practice in this instance. *See also* Part III of this Court's recent opinion in *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinea,* 102 S. Ct. 2099, 2107, 50 U.S.L.W. 4553, 4557 (1982) (deciding due process rights based on the circumstances of that case, not in the abstract. In fact, in the principal cases relied on by respondent to support the ruling below, this Court has ruled only

after the alleged deprivation had taken place. *Hansberry v. Lee,* 311 U.S. 32 (1940); *Sovereign Camp of the Woodmen of the World v. Bolin,* 305 U.S. 66 (1938); and *Hartford Life Ins. Co. v. Ibs,* 237 U.S. 662 (1915). In *Hansberry v. Lee,* in particular, the facts relating to the inadequacy of the prior representation were the determinative element in finding that absent parties were not adequately represented and hence were not bound by the prior decision. *See* 311 U.S. at 43-44. Thus, because adequacy of representation is a vital element in the due process balance, this Court should not attempt to rule on that question in the abstract.[1]

Petitioner also overlooks the fact that at this stage of the proceeding the due process question is not whether it would be constitutional to bind absent class members to an adverse judgment, but whether due process is violated by the mere act of certification of a nationwide class.[2] No court can conclusively decide in advance that its actions will be binding on unnamed class members or other nonparties, whether they are residents of the forum State or not. That determination can only be made at the time of a subsequent challenge, when all the facts are known and the person making the collateral attack is before the Court. *See Hansberry v. Lee, supra.* Since petitioner will have to defend a class action involving at least 11,000 Il-

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[1]In the due process cases relied on in Point II *infra,* this Court has on a number of occasions determined that it is necessary to look at particular circumstances rather than attempting to issue a broad general rule. *See, e.g., Lassiter v. Department of Social Services,* 452 U.S. 18, 31-32 (1981), and *Gagnon v. Scarpelli,* 411 U.S. 778, 790 (1973).

[2]Technically, certification has not yet taken place, but the opinion of the Illinois Supreme Court leaves the trial court virtually no discretion on this matter. Accordingly, we will present the case as if certification had occurred.

linois residents regardless of what the Court decides, it is difficult to understand how an order permitting certification of a nationwide class of 180,000 can, by itself, violate due process. This difference for due process purposes between certification and the binding effect of an adverse judgment is another reason why any challenge to the Illinois Supreme Court's ruling is premature. There are numerous instances where a party has "to litigate under such uncertainty" (Pet. at 8); this is simply another one of them.

There is a further reason for not ruling on the due process claim at this time: it is not being raised by individuals whose rights are subject to possible deprivation, but by their adversary. The Fourteenth Amendment rights at issue here are the "property" rights of absent class members to recover $7.95 from The Gillette Company, yet it is *Gillette* which is arguing that their due process rights are being deprived by the named plaintiff, whose interest is identical to those of the rest of the class, and by the Illinois courts, which are wholly neutral in this matter. Under these circumstances, petitioner lacks standing to raise the due process rights of non-Illinois class members.

The law in the federal courts is clear that questions of justicability, including those of standing, are matters of federal law, and the fact that the Illinois courts have entertained the due process claim by petitioner does not require this Court to consider it also. *See, e.g., Tileston v. Ullman,* 318 U.S. 44 (1943); *Coleman v. Miller,* 307 U.S. 433, 462 (1939) (Frankfurter, J., concurring). The general rule in federal courts is that a party has standing to raise only claims that are personal to him and that the courts will not allow one person to champion the rights of another. *Duke Power Co. v. Carolina Environmental Study Group, Inc.,* 438 U.S. 59, 80 (1978); *Barrows v.*

Jackson, 346 U.S. 249, 255 (1953). *See generally* Note, *Standing To Assert Constitutional Jus Tertii*, 88 Harv. L. Rev. 423 (1974).[3]

While this Court has recognized certain limited exceptions to the general rule and allowed one person to argue for the rights of another, those cases involve special relations, directly tied to the underlying litigation claim, such as schools on behalf of their students, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), physicians and patients, *Doe v. Bolton*, 410 U.S. 179, 188 (1973), and organizations and their members, *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 342-43 (1977). Moreover, insisting upon strict adherence to the law of standing is particularly appropriate in this context since objections which are based on the due process clause of the Fourteenth Amendment are, unlike subject matter jurisdiction, personal to the individual and can be waived. *See Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinea, supra*, 102 S. Ct. at 2104, 50 U.S.L.W. at 4556. This factor has been found to be important by this Court in

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[3]Despite petitioner's assertions (Pet. at 8, n.* and Reply Brief on Pet. at 3), *Hanson v. Denckla*, 357 U.S. 235 (1958), is not to the contrary. There this Court recognized the general prohibition against vindicating the rights of third parties, but found the rule inapplicable because of Florida law, which made a trustee an indispensable party to claims involving a trust, and thereby gave any defendant in the action, even one properly before the Florida court, a right to object to the lack of jurisdiction over the Delaware trustee. *Id.* at 244-45. By contrast here, nothing in the law of Illinois, or for that matter of any other State, gives petitioner an independent right to object to the inclusion of additional non-resident members of the plaintiff class. In essence what petitioner is claiming here is that it has a constitutional right to be sued in fifty states, not just Illinois, and that the due process rights of non-Illinois class members give it that protection. No case has ever held that a defendant may assert any claim of that kind in federal court.

deciding whether to allow the assertion of the rights of another, permitting it to be done only in very limited circumstances. *Singleton v. Wulff*, 428 U.S. 106, 113-116 (1976).

Most important of all for purposes of this case, no prior decision has ever allowed one party to champion the interests of another when they are in fact in a direct adversary relationship, as Gillette is here to the entire 180,000 person class, including the 169,000 out-of-state class members whose due process rights it is pleading before this Court. It is no more proper, we submit, for Gillette to be urging this Court to protect the due process rights of non-Illinois class members, by denying them the right to have their claims against Gillette heard in this case, than it would be for the proverbial fox to be complaining to the farmer that the mother hen is not adequately caring for her baby chicks. Indeed, if the Court hears and denies this due process claim, that may have the effect of foreclosing any legitimate claims that non-Illinois class members may ultimately have on account of any inadequate representation of their interest in these proceedings by respondent and his counsel. And if the plaintiff loses here and such a challenge does take place, Gillette would undoubtedly reverse its position and contend that all class members were in fact bound by the prior ruling in its favor.

Accordingly, both because there is not yet a ripe, concrete claim of a deprivation, and because petitioner lacks standing to raise whatever claim there may presently be, the Court should decline to reach the constitutional question presented.

II. INCLUDING NON-ILLINOIS RESIDENTS AS MEMBERS OF THE PLAINTIFF CLASS WOULD NOT DEPRIVE THEM OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW.

As noted above, *amicus* believes that there are no decisions which deal directly with the situation before this Court. Most of the cases petitioner relies on involve attempts to sue defendants, whereas respondent's principal cases are at least arguably distinguishable because they involve plaintiff classes with a direct connection with the forum State through, for example, the existence of real or personal property in the State, *Hansberry v. Lee, supra, Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), or the issuance of an insurance or similar policy from the headquarters in the State in which the litigation took place, *Hartford Life Ins. Co. v. Ibs*, 237 U.S. 662 (1915), and *Sovereign Camp of the Woodmen of the World v. Bolin*, 305 U.S. 66 (1938).

There is, however, a line of Fourteenth Amendment due process cases that provides a bridge by which the analytical void can be spanned. We refer to those decisions involving the issue of whether, and to what extent, due process protects individuals from deprivations by administrative actions of federal and state agencies. *See e.g. Board of Regents v. Roth*, 408 U.S. 564 (1972).

Of particular significance in this case, since there is no question that the non-Illinois class members have a protected property right in their $7.95 claim against Gillette, is *Mathews v. Eldridge*, 424 U.S. 319 (1976), which sets forth the proper analysis of "what process is due" before a State may deprive a person of an interest protected by the Fourteenth Amendment. Although *Roth* and *Mathews* arose in the administrative rather than the judicial context at issue here, the constitutional origins of the right, and

the analysis required, are identical. *See Lassiter v. Department of Social Services, supra,* 452 U.S. at 33 (due process standards are intended to ensure that "judicial proceedings are fundamentally fair"); *Logan v. Zimmerman Brush Co.,* 102 S. Ct. 1148, 1154-57, 50 U.S.L.W. 4247, 4249-54 (1982) (utilizing due process cases including *Mullane, Roth* and *Mathews*).

This analytical approach to the due process rights of non-Illinois class members has not been argued by either party nor discussed by the courts below. Nonetheless, we believe that the analysis is appropriate in determining whether an unconstitutional deprivation would occur if the non-Illinois class members were to be bound by an adverse decision in this case. Indeed, the balancing of interests required by *Mathews v. Eldridge* produces an inquiry which is substantially the same as that under *International Shoe Co. v. Washington,* 326 U.S. 310 (1945), which was described recently by this Court in *Shaffer v. Heitner,* 433 U.S. 186, 206 (1977), as a determination of "whether the standard of fairness and substantial justice. . ." has been satisfied. *See also Hansberry v. Lee, supra,* 311 U.S. at 42 ("there has been a failure of due process only in those cases where it cannot be said that the procedure adopted fairly insures the protection of the interests of absent parties who are bound by it.")

In *Mathews v. Eldridge, supra,* this Court required the balancing of three separate factors to determine what process is due:

> first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's in-

> terest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail. 424 U.S. at 335.

Accordingly, we will consider each of the three in turn.

1. The Private Interest

In amplifying on this factor in *Mathews,* Justice Powell explained that ". . . the degree of potential deprivation that may be created by a particular decision is a factor to be considered in assessing the validity of any administrative decisionmaking." *Id.* at 341. The property interest at issue here is both fixed and limited: each claim is for no more than $7.95, and is likely to be reduced by costs and attorneys fees, and perhaps the value of the Cricket lighter given in substitution. Thus, if respondent fails in his case against Gillette, there will be at worst a loss of a $7.95 claim, but no class member will have to pay a penny on account of any adverse judgment.[4]

This distinction between a losing plaintiff and a losing defendant is one which former Chief Judge Henry J. Friendly found convincing in his oft-cited article, *"Some Kind of Hearing,"* 123 U. Pa. L. Rev. 1267, 1295-96 (1975): ("For starters, I would draw a distinction between cases in which the government is seeking to take action against a citizen from those in which it is simply denying a

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[4] *Amicus* takes no position on the applicability of the Illinois Consumer Fraud and Deceptive Business Practices Act (Ch. 121 1/2, par. 261, *et seq.*, Ill., Rev. Stat.) to non-Illinois residents. Such an inquiry is not relevant because determinations as to jurisdiction do not decide questions of choice of law. *See Shaffner v. Heitner, supra,* 433 U.S. at 215 n.45; *Kulko v. Superior Court of California,* 436 U.S. 84, 98 (1978); and *Hanson v. Denckla,* 357 U.S. 235, 253 (1958).

citizen's request. . . whatever the mathematics, there is a human difference between losing what one has and not getting what one wants.") *See also Greene v. Lindsay,* 102 S. Ct. 1874, 1878, 50 U.S.L.W. 4483, 4484-4485 (1982), in which this Court recognized that the importance of the right at issue was indicative of the kind of notice that due process requires before it can be taken away. *Cf. Board of Education, Island Trees Union Free School District No. 26 v. Pico,* 102 S. Ct. _____, _____, 50 U.S.L.W. 4831, 4834, 4836 (1982) (distinguishing for First Amendment purposes between removal of library books and refusal to acquire them).

While comparisons between deprivations may be somewhat subjective, it is worth noting several instances in which this Court has recently found a deprivation not to be serious enough to warrant additional protections. Thus, in *Ingraham v. Wright,* 430 U.S. 651 (1977), the Court did not consider that a student's interest in avoiding an undeserved paddling was sufficiently serious to warrant a neutral, prior determination of fault because of the potential tort remedies available should the punishment have been wrongly inflicted. In *Lassiter v. Department of Social Services, supra,* the Court concluded that even the permanent removal of parental rights to a child on account of neglect was not so serious as to require an appointed attorney in every case. And in *Board of Curators, University of Missouri v. Horowitz,* 435 U.S. 78 (1978), the Court agreed that, despite being dismissed from medical school without a formal trial, the plaintiff had received all of the process which was due her. Thus, considering the amount in controversy in this case, and the fact that the interest at stake is merely a claim, the private interest in additional process for non-Illinois class members is clearly not significant.

2. Risk of Erroneous Deprivation

This element has two components, the first encompassing an estimate of the likelihood of error from denying the added process, and the second requiring an estimate of the probable value of any additional safeguards. *Mathews v. Eldridge, supra,* 424 U.S. at 335. Once again, it is necessary to focus the inquiry on precisely which safeguards will and will not be available, depending on whether the plaintiff class is limited to Illinois residents. In cases in which an out-of-state defendant has sought to avoid being sued, the due process concerns have centered on the burdens of being required to litigate in a distant forum, principally the added costs and inconvenience, and the risk of a default judgment from not contesting the claim. *See e.g., Kulko v. Superior Court of California,* 436 U.S. 84, 91 (1978). Added safeguards in that context increase fundamental fairness by permitting the defendant to litigate at "home" or in some other more convenient forum.

The safeguards issue regarding an unnamed plaintiff class member presents a rather different set of considerations. Initially, it should be noted that the entire plaintiff class, Illinois and non-Illinois residents alike, is in the same situation regarding potential additional safeguards. All of them are being represented by Illinois attorneys, who the Illinois courts must decide adequately represent the interest of all class members. If there is adequate representation, then there is nothing for unnamed class members to do in order to protect their interests.[5]

[5]The proof of claim stage is the only part of the litigation that might require personal participation by class members. In most class actions, especially when the amounts involved are small, claims can be filed by mail, in which case there would be no greater burden on non-residents than residents.

The only time the distinction between Illinois and out-of-state residents would make a difference is if there were dissatisfaction with the representation. If they both wished to bring in their own counsel, it might be less convenient to do so for a non-resident, but only if that person wanted to use an out-of-state attorney, or if he or she wished to play a personal role in the litigation. Illinois Civil Practice Act, Section 57.5(a), Ch. 110, Para. 57.5(a) Ill. Rev. Stat. And if either a resident or a non-resident is sufficiently dissatisfied, they can opt out, with no additional difficulty for the out-of-stater. Illinois Civil Practice Act, Section 57.5(b), Ch. 110, Para. 57.5(b) Ill. Rev. Stat. Either would then be free to litigate on an individual basis against Gillette in their own State of residence or in any other place where Gillette might properly be sued. Thus, the added safeguard – being able to participate directly in this controversy, either in this litigation or in a separate action – is minimal, especially in light of the nature of the claim and the amount in dispute. While it may be that in some cases, some out-of-state class member may be disadvantaged in some unknown way, as this Court observed in *Mathews* in commenting on this second element, "procedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions." 424 U.S. at 344.

It is also important to emphasize what is not involved here. This is not a case where class actions have been filed in several States, and Illinois is seeking to require all of the plaintiffs to litigate in its courts. In the three and a half years since Gillette began notifying the class members that they were not going to receive the promised lighters, no other case has been filed. Thus, whatever the Illinois courts might be required to do when there are persons actually,

and not merely theoretically, interested in maintaining their own actions, there is no basis here to believe that any additional protection in the form of allowing others to litigate their cases elsewhere is wanted, let alone warranted or constitutionally mandated.

It is also worth pausing to underscore what petitoner suggests that the Constitution requires non-Illinois class members to surrender in exchange for the right to litigate their claims in their own States. There is, in the person of respondent, with the assistance of his counsel, someone who is prepared to take on their cause. The Illinois courts have agreed to hear it, and they have established procedures to ensure that all class members, regardless of their State of residence, are adequately represented. If petitioner prevails on its due process argument, 169,000 out of a class of 180,000 will have to go elsewhere to find representation, a highly unlikely event, except perhaps in those few States where there are enough class members to justify the cost of bringing suit (J.A. 32). It may be that a few class members would prefer that option, but for most, if this case does not go forward on a nationwide basis, their claims will never ripen into judgments, and will probably never be the subject of another legal action. If it is the rights of these class members that the due process clause is intended to protect, it is difficult to imagine how their lot is improved if petitioner's view of the law is accepted.

3. The Governmental Interest

An analysis of this aspect of the due process balance further demonstrates the uniqueness and untenability of petitioner's claim. In the typical due process case, the government argues that it should not be made to do more than it is already doing. Here, by contrast, Illinois is already doing *more* than petitioner says due process allows, *i.e.*,

agreeing to take on the burden of handling a class composed not only of 11,000 Illinois residents, but 169,000 others who have no direct connection with the State. Thus, focusing on the interest of Illinois, which is the only State which has expressed any interest in this litigation, if it is willing to take on the added burdens, it is difficult to see what aspect of due process prevents it from doing so. Moreover, to limit the class to Illinois residents would undermine the State's policy to provide an adequate means through a nationwide class of vindicating the rights of its residents who are injured in the manner alleged here.

Arguably, the governmental interest here might be that of other States in having a forum to enable their residents to litigate there. However, that interest would be relevant only if, contrary to the history of this litigation, a resident of another State filed his or her own case, and Illinois was depriving that other State of hosting that lawsuit.

There is another more basic reason why the governmental interest is strongly opposed to the claim of petitioner. In its brief (p. 24), petitioner suggests that no State could constitutionally entertain a unified action that encompasses all 180,000 class members. If that is correct, the result will be not one but at least 50 lawsuits, with several States having to deal with cases with fewer than 300 class members.[6]

Surely, the governmental interest in efficient and speedy resolution of claims is not advanced by interpreting the Constitution to require a multiplicity of class actions in lieu of a single one brought in Illinois. Indeed, even in the context of a defendant's claim not to be subjected to litiga-

[6]The record indicates that there are only 7 plaintiffs in Puerto Rico and presumably they would not be able to maintain a class action (J.A. 32). In addition, there appear to be 101 other claimants who are not identified with any State. *Id.*

tion in a State other than its residence, this Court recognized in *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 292 (1980), that the "burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors, including . . . the interstate judicial system's interest in obtaining the most efficient resolution of controversies . . . ." Plainly, that interest will be seriously undermined if petitioner's view of the law is adopted.

Although petitioner's brief seems to suggest that a person's rights cannot be finally determined unless he is actually a party before the court, there is no such hard and fast rule. In a number of cases involving the doctrines of collateral estoppel and *res judicata,* the courts have recognized limited exceptions in which non-parties may be bound by prior judicial determinations. *See e.g., Sea-Land Services, Inc. v. Gaudet,* 414 U.S. 573, 593 (1974); *Southwest Airlines Co. v. Texas International Airlines, Inc.,* 546 F.2d 84, 94-102 (5th Cir.), *cert. denied,* 434 U.S. 832 (1977). As the thoughtful opinion of Judge Wisdom in *Southwest Airlines* indicates, the court will carefully examine the claim that non-parties are bound, and will permit that to occur only when there is an identity of interest with the prior litigants, and where the interest of the non-party has been adequately represented by them. Since here the interests of the class members and respondent are the same, and since the Illinois courts will ensure adequate representation, these cases lend further support for the proposition that due process does not prevent inclusion of all 180,000 class members.[7]

[7]Another example of a situation in which this Court has allowed a state court to adjudicate important rights where one of the parties had no connection whatsoever with the forum State is the area of divorce. *See, e.g., Williams v. North Carolina,* 317 U.S. 287, 297-99 (1942). While the divorce area is factually distinguishable from the class ac-

If this Court were to rule that no one State could entertain a class action such as this, the States might well seek from Congress, and Congress might well enact, a new jurisdictional provision allowing multistate class actions to be brought in federal courts, regardless of the amount in controversy. However, even this solution may be unconstitutional under petitioner's theory. Although petitioner asserts that a federal alternative is somehow different (Br. 15 n.*), it never specifically acknowledges that even Congress could constitutionally allow this case to be heard in a single federal court. In part, this may be due to the requirement in diversity suits that, at least until now, the rules regarding personal jurisdiction are those of the forum state. *See Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinea, supra,* 102 S. Ct. at 2103, 50 U.S.L.W. at 4555; *id.* at 2109, 50 U.S.L.W. at 4558, Powell, J. concurring. *Cf. Califano v. Yamaski,* 442 U.S. 682, 702-03 (1979) (nationwide class upheld based on federal claim). Thus, accepting petitioner's theory might well make it impossible for even the federal courts to handle multistate plaintiff diversity class action where state courts could not constitutionally do so.

Of course, all of these problems can be avoided by concluding that due process is not violated when a state court includes non-residents in its class actions, at least where there is no other State in which similar claims are pending and the court finds that the plaintiff and his counsel adequately represent all members of the class. In this connection, it would be well to recall the admonition of this Court in *Matthews v. Eldridge, supra,* that "substantial

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tion involved here, the divorce decisions nonetheless demonstrate that the mechanical boundary line which petitioner seeks to erect is not constitutionally based.

weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of the . . . programs that the procedures they have provided assure fair consideration of the entitlement claims of individuals." 424 U.S. at 349. Nothing in the concept of due process requires Illinois to accept a nationwide class, but if it chooses to do so, due process does not forbid it.

4. The Balance Lies Decidedly In Respondent's Favor

Having reviewed all three factors, the Court must strike an appropriate balance to decide whether the process given out-of-state class members is adequate. In doing so, the Court should assume that all other aspects of this action will be constitutionally handled, *i.e.*, notice will be adequate, the claims of respondent are typical and not antagonistic to the other members of the class (*see Hansberry v. Lee, supra*), and respondent and his counsel will in all other respects adequately represent the interests of class members, both Illinois and non-Illinois residents. These assumptions seem fully warranted in light of the Illinois class actions statutes and the decision of the Illinois Supreme Court in this case (Cert. Pet. App. A 5-9).

Based on these considerations, it seems clear that non Illinois class members are receiving all the process to which they are due on their claim which cannot exceed $7.95. None of them has expressed any interest in separate litigation on their claims, nor would a nationwide class preclude them from proceeding alone, if they elected to do so in a timely fashion. There are no other protections that are likely to reduce the risk of an erroneous loss of their claim, and the government interest in not having multiple class suits is very strong. Therefore, even if non-residents of Il-

linois were eventually to try to overturn an unfavorable judgment in this case by claiming that they were denied due process, there is no basis for concluding that the fact of non-residence alone would entitle them to argue that the Illinois courts have deprived them of property without due process of law.

As this Court observed in *Kulko v. Superior Court of California, supra,* 436 U.S. at 92, the concept of due process is "not susceptible of mechanical application . . . ." *See also Cafeteria & Restaurant Workers Union v. McElroy,* 367 U.S. 886, 895 (1961) (rejecting fixed rules of due process in favor of flexible approach balancing the governmental and private interests involved). In light of those decisions, and when judged by the standard of *Mathews v. Eldridge,* there can be no doubt that the out-of-state class members in this case will receive all of the process which they are due. As this Court recognized in *Mathews,* "[a]t some point the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the cost." 424 U.S. at 348. If petitioner is correct that at least fifty separate actions are required, it is plain that that line will have been crossed, and the costs to society will be too great to require it. Accordingly, the Court should conclude that there is no due process impediment to the certification order of the Illinois Supreme Court.

CONCLUSION

For the foregoing reasons, the petition should be dismissed for want of federal jurisdiction, or in the alternative, the decision of the Illinois Supreme Court should be affirmed.

Respectfully submitted,

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(Counsel of Record)

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Public Citizen

August 4, 1982

Docket Sheet

NO. 81-1493-CSX	TITLE The Gillette Company, Petitioner v. Steven MINER

DOCKETED	COURT
February 9, 1982	Supreme Court of Illinois

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioner: H. Blair White
	Counsel for Respondent: Robert S. Atkins
Feb. 9, 1982	Petition for writ of certiorari filed. (Record filed).
March 12, 1982	Brief for the respondent in opposition filed.
March 15, 1982	Motion of National Association of Independent Insurers, et al. for leave to file a brief as amici curiae filed.
March 17, 1982	DISTRIBUTED. 4-2.
March 19, 1982	Reply brief for the petitioner filed. (D).
Apr. 5, 1982	The motion of National Association of Independent Insurers, et al. for leave to file a brief as amici curiae is GRANTED. Petition GRANTED.

May 12, 1982	Order extending time to file the joint appendix and petitioner's brief on the merits until June 4, 1982.
June 1, 1982	Joint appendix filed.
June 1, 1982	Brief for the petitioner filed.
June 4, 1982	Motion of Plaintiffs in the "Dalkon Shield" IUD Products Liability Litigation for leave to file brief as amicus curiae filed.
June 7, 1982	Motion of New England Legal Foundation for leave to file a brief as amicus curiae filed.
June 7, 1982	Motion of National Association of Independent Insurers, et al. for leave to file a brief as amici curiae filed.
June 14, 1982	The motion of Plaintiffs in the "Dalkon Shield" IUD products Liability Case for leave to file a brief as amicus curiae is GRANTED. The motion of New England Legal Foundation for leave to file a brief as amicus curiae is GRANTED. The motion of National Association of Independent Insurers, et al. for leave to file a brief as amici curiae is GRANTED.
June 24, 1982	Order extending time to file the respondent's brief on the merits until Aug. 4, 1982.
Aug. 4, 1982	Motion of Public Citizens for leave to file a brief as amicus curiae filed.
Aug. 5, 1982	Motion of Consumer Coalition for leave to file a brief as amicus curiae filed.
Aug. 5, 1982	Brief for the respondent filed.
Aug. 7, 1982	Brief, amici curiae, of Tyrone C. Fahner, Attorney General of Illinois, et al. filed.
Sept. 3, 1982	CIRCULATED.

(Over)

81-1493

Title

No.

DATE	PROCEEDINGS AND ORDERS
Sept. 9, 1982	The motion of Public Citizen for leave to file a brief as amicus curiae is GRANTED. The motion of Consumer Coalition for leave to file a brief as amicus curiae is GRANTED.
Oct. 22, 1982	Reply brief for the petitioner filed. (D).
Oct. 26, 1982	Motion of Consumer Coalition for leave to participate in oral argument as amicus curiae filed.
Nov. 1, 1982	The motion of Consumer Coalition for leave to participate in oral argument as amicus curiae is DENIED.
Nov. 10, 1982	ARGUED.